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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
GARY A. ORSECK
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

QUESTIONS PRESENTED

In this case, the court of appeals upheld a Baltimore ordinance that bans cigarette advertising on certain outdoor signs. The questions presented are:

1. Whether a restriction on non-misleading commercial speech may be upheld where the reviewing court asked only whether the legislature could have found a "logical nexus" between the restriction's means and ends, and made no independent inquiry whether the restriction either would in fact materially advance its goals or was narrowly tailored to do so.

2. Whether an ordinance that bans cigarette advertising on billboards escapes preemption under the Federal Cigarette Labeling and Advertising Act on the ground that the ordinance does not purport to dictate the content of cigarette advertisements.

RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. Petitioner Penn Advertising of Baltimore, Inc. ("Penn") is a Delaware corporation. Its parent company is Penn Advertising, Inc. Penn has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 63 F.3d 1318. The opinion of the district court (Pet. App. 13a-45a) is reported at 862 F. Supp. 1402.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1995, and a timely petition for rehearing was denied on October 16, 1995. Pet. App. 68a-69a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), provides: "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

STATEMENT

1. This case involves a challenge, under the First Amendment and on federal preemption grounds, to an ordinance ("Ordinance 307" or "the ordinance") of the City of Baltimore, Maryland ("the City"), that bans cigarette advertising on certain outdoor signs. Pet. App. 70a-78a. The ordinance prohibits signs or "other form[s] of advertising that advertise[ ] cigarettes in a publicly visible location," and defines "publicly visible location" to include "outdoor billboards, sides of building[s], and free standing signboards." Baltimore City Code, art. 30 (zoning), § 10.0-1(I) (Pet. App. 75a). At the same time, however, the ordinance creates significant exceptions to this restriction, permitting cigarette advertisements (1) on buses and taxicabs, and on commercial vehicles used to transport cigarettes; (2) at locations licensed to sell cigarettes, which allows many signs and display advertisements in and on the outside of numerous

stores; and (3) at professional sports stadiums.[1] *Id.* at 75a-77a; see also *id.* at 79a-82a (later ordinance broadening exemption for signs on stores that sell cigarettes).

The City enacted the ordinance for the stated purpose of attempting to "reduce[ ] the illegal consumption of cigarettes by minors." Pet. App. 4a. In adopting the ordinance, the Baltimore City Council cited studies it characterized as suggesting that advertising may stimulate the consumption of cigarettes by minors, that cigarettes commonly are used by minors, and that use of cigarettes may lead to the abuse of hard drugs. See *id.* at 3a-4a. The Council did not, however, receive or rely upon any evidence indicating that Ordinance 307's particular and qualified restriction on billboard and similar advertising would have *any* effect, let alone a material one, on the use of cigarettes by minors.

Petitioner Penn Advertising of Baltimore, Inc. ("Penn") is engaged in the business of displaying commercial and public service messages on outdoor signs located throughout Baltimore. Penn leases property from private owners for its signs, erects and maintains the signs, and makes its signs available to advertisers who wish to display their messages in Baltimore. Penn's customers include companies that advertise cigarettes. It is not disputed that the commercial messages displayed by Penn are truthful, non-misleading, and concern lawful activity.

Penn brought this challenge seeking a judgment that Ordinance 307 is inconsistent with the First Amendment to the United States Constitution and is preempted by Section 5(b) of the Cigarette Labeling and Advertising Act ("the Act"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of * * * cigarettes." 15 U.S.C. § 1334(b). After the City moved to dismiss the action or, alternatively, for summary judgment in its favor, the district court denied Penn's request for additional time to conduct discovery concerning the City's intent in enacting the ordinance and the probable actual effect of the ordinance. Pet. App. 4a;

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[1] In addition, the ban exempts certain billboards, including those along interstate highways and in certain areas that are zoned for industrial or other specified business use.

Ct. App. J.A. 933. Instead, the district court granted the City's motion for summary judgment, holding that the ordinance satisfied the constitutional requirements for restrictions on commercial speech and that the ordinance was not preempted because it was not "based on smoking and health." *Id.* at 13a-45a.

2. The court of appeals affirmed. Pet. App. 1a-12a. Turning first to the preemption question, the court acknowledged that, according to the plain terms of the Act, a state law or municipal ordinance "based on smoking and health" must be set aside. The court nevertheless rejected the claim of preemption, finding it crucial that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a (emphasis in original). As a consequence, even though the City's counsel conceded at oral argument (Ct. App. Tr. 23) that the restriction on advertising was designed to advance public health goals, the panel concluded that the ordinance "neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*." *Ibid.* (emphasis in original).[2]

On the First Amendment issue, the court of appeals began by reciting the standard for reviewing restrictions on commercial speech: (1) "the speech must first concern lawful activity and not be misleading." *Id.* at 10a. If that threshold requirement is satisfied, the regulation survives First Amendment scrutiny "if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation 'directly advances the governmental interest asserted'; and (4) the regulation is not 'more

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[2] Significantly, the court of appeals did not accept the argument advanced in the City's brief that the ordinance was not based on health considerations because its drafters identified as its purpose the facilitation of compliance with a state law (which itself was based on health concerns) that precludes the sale of cigarettes to minors. To the contrary, the court acknowledged in its discussion of the First Amendment that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors." Pet. App. 10a. Indeed, the ordinance's preamble itself adverts to health concerns, and the debate leading to adoption of the ordinance was replete with references to the connection between smoking and health. See, *e.g.*, Ct. App. J.A. 461-463, 687, 690.

extensive than necessary' to serve the interest." *Ibid.*, quoting *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

The parties did not dispute that the restricted speech here is truthful and concerns lawful activity, and the court of appeals accepted the City's contention that the governmental interest in preventing the purchase and consumption of cigarettes by minors is substantial. Pet. App. 10a. Thus, in the court's view "[t]he principal dispute in this case center[s] on *Central Hudson*'s third and fourth prongs": whether the ordinance directly advances the stated government interest and whether it is narrowly tailored to advance that interest. *Id.* at 10a-11a. Elaborating on these standards, the court held that when the government defends a restriction on commercial speech it need not "'prove conclusively that [a] correlation [between the regulation and the governmental interest] in fact exists'"; instead, "'[t]he proper standard for approval must involve an assessment of reasonableness of the legislature's belief that the means it selected will advance its ends.'" *id.* at 11a, quoting *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir. 1995), cert. pending, No. 95-685 (reprinted at Pet. App. 46a-67a).[3] And while the court acknowledged that a restriction on commercial speech must be narrowly tailored, it concluded that the City need not "'abandon altogether an approach that directly advances its goal.'" *Id.* at 11a-12a, quoting *Anheuser-Busch*, 63 F.3d at 1316 (Pet. App. 63a).

Applying these standards here, the court of appeals upheld Ordinance 307. In doing so, the court made no attempt to determine whether the particular advertising restriction imposed by the ordinance would in fact have any effect on the use of cigarettes by minors, and it made no reference to the evidence offered by Penn to establish that advertising does not induce minors to smoke. Instead, noting its observation in the companion *Anheuser-Busch* case that certain studies had "linked alcohol advertising to underage drink-

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[3] The decision in *Anheuser-Busch*, upon which the court of appeals relied in this case, rejected a First Amendment challenge to a Baltimore ordinance that precludes liquor advertising on essentially the same set of signs as is involved in this case. Pursuant to this Court's Rule 14.1(i)(ii), the *Anheuser-Busch* opinion is reproduced in the Appendix.

ing," the court found a "'logical nexus'" between the City's goal and the ordinance's partial ban on cigarette advertisements. Pet. App. 11a (citation omitted). Similarly, the court found it unnecessary to address Penn's argument that the advertising ban was not narrowly tailored because it restricted only a limited subset of the advertising signs to which minors are exposed in the City, or because the City failed to consider alternative means of achieving its goal that did not limit speech (such as enhanced enforcement of laws barring the sale of cigarettes to minors). Instead, again by reference to its holding in *Anheuser-Busch*, the court simply observed that the fourth prong of *Central Hudson* was satisfied because there was no "'less restrictive means of screening outdoor advertising from minors.'" *Ibid.*, quoting *Anheuser-Busch*, 63 F.3d at 1316 (Pet. App. 63a).

REASONS FOR GRANTING THE PETITION

This case presents constitutional and statutory issues of substantial importance. The court of appeals' First Amendment analysis raises fundamental questions regarding the nature of intermediate scrutiny of restrictions on speech; the approach taken below essentially abdicates judicial responsibility in the area of commercial expression, deferring almost completely to any legislative judgment that is not manifestly irrational on the face of the legislative record. At the same time, the holding on preemption effectively nullifies an important provision of the Federal Cigarette Labeling and Advertising Act, scuttling a carefully crafted legislative compromise between proponents and opponents of restrictions on cigarette advertising — and in the process creating an intercircuit conflict.

These issues, moreover, are recurring ones of great practical significance. As is demonstrated by the Court's recent cases in the area — including *44 Liquormart, Inc.* v. *Rhode Island*, No. 94-1140, cert. granted, 116 S. Ct. 35 (1995), which was argued on Nov. 1, 1995[4] — governments at all levels are attempting with increasing frequency to restrict commercial speech that addresses disfavored products or services, or that uses disfavored methods of communication. In particular, restrictions on cigarette advertising have been

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[4] As we explain below, the Court might wish to hold this case pending disposition of *44 Liquormart*.

enacted or are being considered by state and local governments across the nation.[5] Against this background, the decision below is sure to have a significant impact in shaping these legislative initiatives throughout the United States. Because that decision is deeply flawed, and because it is inconsistent with the holdings of this Court and creates a conflict among the courts of appeals, further review is imperative.

I. THE ORDINANCE CANNOT SURVIVE SCRUTINY UNDER THE FIRST AMENDMENT

The court of appeals' approach to the First Amendment quite plainly cannot be reconciled with this Court's decisions. The Fourth Circuit held that a restriction on commercial speech must be upheld so long as the enacting legislature rationally could have believed, on the basis of the materials it had gathered, that the restriction would advance important state interests; this Court, in contrast, has made clear that a court must apply its independent judgment, considering the record made in the judicial proceeding, in determining whether the requirements of the First Amendment are satisfied. Moreover, the Fourth Circuit held that there is no need for a showing that a restriction on commercial speech actually will advance its stated goals, let alone to a material degree; this Court has held repeatedly that just such a showing is necessary. And the Fourth Circuit rejected the argument that the ordinance is unconstitutionally underinclusive; this Court has found identical arguments to be persuasive. Because the

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[5] In 1994, Cincinnati, Ohio passed an outdoor advertising ban that is due to take effect in 1996. In 1994, Preston, Minnesota passed an ordinance banning most tobacco advertising in retail stores. Also in 1994, two local boards of health in Massachusetts adopted regulations banning all outdoor tobacco advertising and most tobacco advertising in retail stores. In addition, several public transit authorities have banned tobacco advertising on their facilities — *e.g.*, San Diego, California (1994) and Albany, New York (1993). A few cities have ended tobacco advertising on city-owned property — *e.g.*, San Francisco, California (1992) and New York, New York (1992). Utah banned tobacco advertising on billboards in 1921 as part of a broader Prohibition-era statute prohibiting the sale of cigarettes altogether (the sales ban was repealed in 1923). Bans on outdoor advertising of tobacco products have been proposed in Atlanta, Cleveland, Memphis, Pittsburgh, and San Francisco.

decision below is symptomatic of and will contribute to confusion about the proper standard for courts to apply in scrutinizing restrictions on commercial speech, this Court should grant review.

A. Courts Must Undertake Searching Judicial Review Of Restrictions On Commercial Speech

1. As the Court has had occasion to explain repeatedly in recent years, restrictions on commercial speech of the sort challenged here "threaten[ ] societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. * * * [T]he general rule is that the speaker and the audience, and not the government, assess the value of the information presented." *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993).[6] Indeed, "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995), quoting *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The importance of that consideration has led the Court to hold consistently that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See, *e.g.*, *Coors*, 115 S. Ct. at 1592-1593; *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084,

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[6] Similarly, content-neutral restrictions on non-commercial speech, which are subject to a searching "intermediate scrutiny" similar to that used to assess regulations of commercial expression (see *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2469 (1994)), "'can significantly impair the ability of individuals to communicate their views to others'" and thus impair the "'unfettered interchange of ideas.'" *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2045 n.13 (1994), quoting Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 57-58 (1987) (citation omitted). The Court has indicated that the test governing such restrictions is "very similar" to that applied to limits on commercial speech. *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993). See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). The approach adopted by the Fourth Circuit therefore has implications for a very broad range of expressive activity.

2088 n.7 (1994); *Edenfield*, 113 S. Ct. at 1800; *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993).

To effectuate these policies, the Court requires the government to demonstrate that its restriction satisfies what has become the familiar four-part test first stated in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 566 (1980):

> [1] For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

2. The court of appeals correctly observed that the final two prongs of this test are principally at issue here, but it went fatally astray in its understanding of the government's burden in satisfying — and of the judiciary's role in applying — the *Central Hudson* test. In the Fourth Circuit's view, "'[i]f it appears to the [reviewing] court that the legislative body *could reasonably have believed* * * * that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.'" Pet. App. 6a (emphasis added), quoting *Anheuser-Busch*, 63 F.3d at 1311 (Pet. App. 54a). The court below therefore held that a reviewing court must find only

> "a logical nexus between the City's objective and the means it selected for satisfying that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. * * * The proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends."

Pet. App. 11a (emphasis added), quoting *Anheuser-Busch*, 63 F.3d at 1314-1315 (Pet. App. 60a). Thus, under the court of appeals' approach, while a party challenging a restriction on commercial speech may show that "'the legislature acted *irrationally*, it cannot subject legislative findings themselves to judicial review under a

clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to another.'" *Id.* at 6a-7a, quoting *Anheuser-Busch*, 63 F.3d at 1312 (Pet. App. 55a) (emphasis added).[7]

The Fourth Circuit's conclusion that a reviewing court is bound by the legislature's factual determinations — and is limited to asking whether the legislature acted "irrationally" — would be correct if restrictions on commercial speech were assessed under the lowest level of rationality review. See, *e.g.*, *FCC* v. *Beach Communications*, 113 S. Ct. 2096, 2102 (1993). But the court's approach entirely fails to recognize that the First Amendment standard applicable here

> is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the substantial fit we require.

Board of Trustees v. *Fox*, 492 U.S. 466, 480 (1988) (citations omitted).

As a consequence, in cases involving restrictions on speech the Court consistently has held that "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). A legislative determination thus "'does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution.'" *Id.* at 843-844, quoting *Whitney* v. *California*, 274 U.S. 357, 378-379 (1927)

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[7] The court of appeals elaborated on this conclusion in *Anheuser-Busch*, the companion decision to the one challenged here, explaining that a legislature's conclusions about the effect of its enactment "are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court." 63 F.3d at 1312 (Pet. App. 55a).

(Brandeis, J., concurring). In this inquiry, the Court must bring its "independent judgment" to bear. *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 129 (1989). See *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring). It could hardly be otherwise: if the court of appeals were correct that a legislature could insulate a restriction on speech from review simply by adverting to materials in the legislative record, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications*, 435 U.S. at 844. Indeed, in the specific context of commercial speech the Court has warned that without judicial scrutiny of the purported justification for a challenged restriction, "'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Coors*, 115 S. Ct. at 1592, quoting *Edenfield*, 113 S. Ct. at 1800. See *Ibanez*, 114 S. Ct. at 2092.

Against this background, this Court has not countenanced the limited judicial scrutiny of restrictions on commercial speech espoused by the court of appeals; instead, the Court has emphasized the importance of *searching* judicial review. "The state's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Ibanez*, 114 S. Ct. at 2089, quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). This burden "'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' * * * This requirement [is] critical * * *." *Coors*, 115 S. Ct. at 1592, quoting *Edenfield*, 113 S. Ct. at 1798, 1800.

Under this approach, a court cannot reject a First Amendment challenge by pointing to "anecdotal evidence and educated guesses" (*Coors*, 115 S. Ct. at 1593), or even to formal studies proffered by the government. See *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471-2472 (1994) (plurality opinion). Instead, it is "incumbent upon" a court "to go behind the legislative determination and examine for itself" the factual assumptions upon which the

restriction is based. *Landmark Communications*, 435 U.S. at 844. And while courts do not wholly disregard legislative judgments, particularly those that are predictive or discretionary in nature and therefore are not susceptible of empirical proof, that does not mean that such judgments "are insulated from meaningful judicial review altogether. On the contrary, we have stressed in our First Amendment cases that deference to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Turner Broadcasting*, 114 S. Ct. at 2471, quoting *Sable*, 492 U.S. at 129. Similarly, the requirement that the restriction on speech "will in fact alleviate the[ ] harms [targeted by the regulation] in a direct and material way" (*Turner*, 114 S. Ct. at 2470) obligates the court to look not only to the legislative record, but also to evidence presented in the judicial proceeding relating to the actual and anticipated operation of the restriction. See *Coors*, 115 S. Ct. at 1593; *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2375-2376 (1995); *Ibanez*, 114 S. Ct. at 2090 & n.10; *Edenfield*, 113 S. Ct. at 1801-1803; *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 95-96 & n.10 (1977).

3. The Court's application of these principles in its recent decisions establishes that close review of the materials actually relied upon by the legislature — as well as of the record evidence submitted by the party challenging a restriction on speech — is essential. In *Turner Broadcasting*, for example, the Court was unwilling to defer even to the most elaborate and detailed congressional findings, reversing a grant of summary judgment in the government's favor.[8] The case involved a challenge to the so-called "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. The statute was enacted after three years of hearings (see 114 S. Ct. at 2454) and contained "unusually detailed statutory findings" about the purported necessity for the challenged restrictions (*id.* at 2461); as in this case, the legislature relied on a study (in *Turner Broadcasting*, one prepared by the Federal Communications Commission) purportedly supporting the legislative conclu-

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[8] Although *Turner Broadcasting* involved noncommercial speech, the challenge was to a content-neutral restriction; that type of regulation is judged under an intermediate scrutiny standard very similar to that applicable to regulations of commercial speech. See note 3, *supra*.

sions. The Court nevertheless found the congressional findings insufficient to support the Cable Act's restrictions on speech.

The plurality held that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied" its burden of showing that the must-carry provisions would not burden more speech than necessary. 114 S. Ct. at 2470. In particular, the Court itself reviewed the FCC study and found it insufficiently probative (see *id.* at 2471), explaining that "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * * ." *Id.* at 2472.[9] See also *Coors*, 115 S. Ct. at 1592-1594 (refusing to defer to congressional judgment on effect of restriction on commercial speech).

Similarly, in *Edenfield* the Court invalidated Florida's ban on in-person solicitation of business by certified public accountants. The Court recognized that the interests asserted by the State were substantial. See 113 S. Ct. at 1799-1800. But the Court was unwilling to defer to the State's assertions about the necessity for and the effectiveness of its regulation. Instead, the Court conducted a searching examination of the record materials bearing on the effect of the challenged ban on speech. This independent examination of the evidence led the Court to find the restriction unconstitutional because the State "has not demonstrated that * * * the ban on CPA solicitation advances its asserted interests in any direct and material way." 113 S. Ct at 1800.

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[9] The section of the *Turner* opinion discussed here, 114 S. Ct. at 2470-2472, was joined by four members of the Court. Three others would have struck down the restriction outright, without need for further factfinding. See *id.* at 2479-2480 (O'Connor, J., joined by Scalia and Ginsburg, JJ., concurring in part and dissenting in part) (finding must-carry rules unconstitutionally overbroad because not narrowly tailored). Justice Stevens, who dissented from the plurality's "application of [the] standard," did not disagree with the principles announced. See *id.* at 2473 n.1 (Stevens, J., concurring in part and concurring in the judgment).

The Court took an identical approach in *Ibanez*, where it invalidated another Florida restriction on advertising by certified public accountants. The Court declined to defer to the "State's 'unsupported assertions,'" explaining that "'broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.'" 114 S. Ct. at 2089 (citation omitted). After concluding that the record materials did not support the State's assertions (see *id.* at 2090 n.10), the Court held that in the "'absence of evidence,'" the State's "'concern about the possibility of [harm] in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.'" *Id.* at 2090 (citation omitted).

The Fourth Circuit's holding is flatly inconsistent with this Court's approach. In the court of appeals' view, the factual premises that underlay a legislature's judgment are insulated from review, and a court may consider only whether the legislature reasonably could have believed that there was a logical nexus between the legislative means and ends. See page 8, *supra*. This Court, in contrast, has emphasized that a court must conduct its own meaningful and independent review to determine whether the legislative judgment is in fact adequately supported. The fundamental error committed below warrants this Court's attention.

4. In limiting itself to the legislative record and deferring to the legislative assessment of that record, the court of appeals may have been led astray by arguably imprecise language in several of this Court's opinions. In *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court upheld bans on advertisements of gambling,[10] explaining that "the Government obviously legislated on the premise that the advertising of gambling serves to increase demand for the advertised product." *Edge Broadcasting*, 113 S. Ct. at 2707. See *Posadas*, 478 U.S. at

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[10] In *Edge*, the challenged statute prohibited the broadcast of any lottery advertisement from a state that did not allow lotteries to be conducted. See 113 S. Ct. at 2701-2702. In *Posadas*, a Puerto Rico law prohibited Puerto Rico casinos from advertising their services to Puerto Rico residents. See 478 U.S. at 335-336, 340.

344. The court of appeals, citing in its *Anheuser-Busch* opinion to *Edge* and *Posadas*, understood the Court to have held in those decisions that a restriction on commercial speech will be upheld whenever "a logical correlation existed between the legislative objective and the means selected to achieve that objective." Pet. App. 59a.

The Fourth Circuit's decision reflects a basic misunderstanding of this Court's rulings. It was not contested in *Edge* or *Posadas* that the challenged advertising ban would reduce demand for the "product" advertised. Fairly read, however, neither case stands for the proposition that contrary evidence may be ignored — or that limited and gerrymandered advertising restrictions like those in Ordinance 307 may be presumed to affect demand. If that were the case, literally *any* restriction on advertising or labeling would be upheld without further scrutiny. That plainly is not the law, and any implication to the contrary in *Edge* and *Posadas* cannot survive the Court's most recent First Amendment decisions in *Coors*, *Edenfield*, and *Ibanez*. But the language in *Edge* and *Posadas*, if broadly read, nevertheless stands as a source of potential confusion for the lower courts; that makes it even more essential for this Court to clarify this area of the law.

B. The Court Of Appeals Misapplied The Third And Fourth Prongs Of The *Central Hudson* Test

1. *The "directly and materially advances" requirement.* The court of appeals' misunderstanding of the nature of intermediate First Amendment judicial scrutiny caused it to err in its application of the third and fourth prongs of the *Central Hudson* test. The third prong, of course, requires the government to "demonstrate that the restriction on commercial speech directly and materially advances" a substantial interest. *Went For It*, 115 S. Ct. at 2376. The Fourth Circuit held that, in satisfying this requirement, "'it is *not* necessary * * * to prove conclusively that the correlation [between the government's objective and the restriction on speech] *in fact exists*.'" Pet. App. 11a (citation omitted) (emphasis added). But that approach has been expressly and repeatedly rejected by the Court, which has labeled "critical" the requirement that "'a governmental body seeking to sustain a restriction on commercial speech * * * demonstrate that the harms it recites are real and that its restriction *will in fact*

alleviate them to a material degree.'" *Coors*, 115 S. Ct. at 1592 (citation omitted) (emphasis added).

As the holding below demonstrates, the court of appeals' departure from this Court's approach involves more than semantics; it led (and in the future will lead) to the validation of restrictions on speech that manifestly do not in fact serve any proper purpose. Indeed, this case provides a compelling example of the harm that flows from unduly relaxed judicial review. The record here provides no basis for concluding that the ordinance will have the slightest impact on underage smoking, let alone that it will materially advance the goal of reducing such activity. To be sure, the court of appeals cited studies characterized by the City Council as suggesting that there is a link between advertising *in general* and demand for cigarettes. See Pet. App. 3a-4a. That proposition was hotly disputed, however.[11] More particularly, speakers at the City Council's hearing on the ordinance noted that even the studies identified by the ordinance's supporters could not justify the speech restriction goal because they say nothing about the effect that *billboard* advertising has on smoking by *minors*. *E.g.*, Ct. App. J.A. 694, 703. The Fourth Circuit declined even to consider the specific criticisms and evidence presented to the City Council and demonstrating that the ordinance would not directly advance the City's goals to a material degree and would not be narrowly tailored.

Moreover, although the City did not offer additional evidence to the courts below to justify the ordinance under the *Central Hudson* test, Penn provided studies and affidavit evidence demonstrating that the ordinance in fact would *not* directly and materially advance the goals identified by the City Council, and that it was not narrowly tailored to achieve those goals. Penn thus put forward evidence that reducing advertising would have no effect on smoking — either in the general population or among minors. Ct. App. J.A. 1030-1117 (studies and reports). The 1987 Economic Report of the President, for example, concluded that cigarette advertisements serve principally to increase the advertiser's market share rather than overall de-

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[11] The validity of the studies cited by the City Council was called into question by some speakers at the Council's hearing on the ordinance. See, *e.g.*, Ct. App. J.A. 694.

mand for the product. *Id.* at 992, 1030-1035. The Report also concluded that bans on advertising do not reduce smoking and that advertising does not have a substantial effect on the rate at which children smoke. *Id.* at 991-994, 1035; see also 1040-1107. A study of tobacco advertising bans in other countries found that banning advertising has no effect on smoking rates. *Id.* at 1048. A paper reviewing the international experience with cigarette advertising bans (presented at the 1991 World Conference on Health Education) concluded that there is no basis to believe that such bans will either curtail tobacco consumption generally or reduce new smoking among minors. *Id.* at 1073. Finally, a review of the research on children, smoking and advertising determined that there is no reason to believe that banning advertising would diminish the number of minors who begin smoking. *Id.* at 1109. Without making *any* attempt to look behind this conflicting evidence regarding the effect of advertising on overall demand for cigarettes, it was impossible for the court below to find that the ordinance "will in fact" achieve its goals.

Perhaps more fundamentally, there is absolutely *no* evidence in the record (or anywhere else, so far as we are aware) that the billboard advertising barred by the ordinance increases smoking by any segment of the public, let alone minors. Indeed, one of the studies relied upon by the City addressed only advertisements found in newspapers and magazines, which are not affected by the ordinance. Ct. App. J.A. 858-859. Another considered students' perceptions of specific advertisements, but did not conclude that a ban on advertising would reduce adolescent smoking rates. *Id.* at 866-868. And needless to say, there is no evidence at all that a ban on billboard advertising for cigarettes will reduce demand when, as here, the municipality *permits* many cigarette advertisements elsewhere, including some (such as those on the exterior walls of retail establishments, at sports stadiums, and on buses) that are sure to be seen repeatedly by minors.

Even if the City's speculation (that reducing the number of cigarette advertising signs will reduce smoking by minors) were well-founded, any benefit from the ordinance would still depend on the conclusion that the ordinance will in fact reduce the number of such advertisements. But the record suggests that the ban will not even accomplish this goal. In his affidavit, Penn's General Manager described the wide variety and substantial number of non-billboard

cigarette advertisements that are unaffected by the ordinance; exhibits attached to the affidavit provided examples of those advertisements. Ct. App. J.A. 1122-1124, 1127-1147. In a particularly striking passage, he noted that: "MTA [buses] are used to transport thousands of Baltimore City students to school each day. Advertisements [for cigarettes] on MTA [buses] * * * are specifically exempted from [the ordinance]." *Id.* at 1122. He also described and provided examples of on-site store advertising, taxi advertisements, and newspaper advertisements. The City did not answer and the court below did not address this evidence. Indeed, the unrefuted evidence demonstrates that the primary effect of the ordinance's discrimination would be simply to impose economic punishment on billboard owners, such as Penn, and to benefit other advertising media, such as on-site locations, taxis and buses, and newspapers. *Id.* at 1121-1122, 1124-1125.

Against this background, the City has offered no proof that the ordinance "will in fact" reduce underage smoking "to a material degree." *Edenfield*, 113 S. Ct. at 1800. Nor is any such conclusion plausible. While there is no record evidence establishing how many retailers and others display cigarette advertising, it is certain that, in a city of Baltimore's size, there are *thousands* of locations at which cigarette advertising remains permissible. Furthermore, the City has failed entirely to show that the ordinance will produce *any* net reduction in the quantity of cigarette advertising to which youths are exposed, since cigarette manufacturers presumably could switch their advertising from billboards to other media that also incidentally reach children. See Ct. App. J.A. 1121-1124.

In sum, the argument relied on by the City is identical to that rejected by this Court in *City of Cincinnati* v. *Discovery Network, Inc.*, *supra*, where Cincinnati's attempt to serve safety and esthetic interests by banning certain newsracks was invalidated because it had "only a minimal impact on the overall number of newsracks on the city's sidewalks." 113 S. Ct. at 1511. In this case as well, there is no evidence that the effect of the ordinance on the volume of commercial speech for the targeted product will be anything other than minimal. To the contrary, for all that appears from the record,

the impact of the Baltimore ordinance will be no more substantial than that of Cincinnati's newsrack ban.[12]

None of this, of course, is to gainsay the importance of minimizing smoking by minors. As we have explained, however, there is reason to doubt that any advertising ban will reduce demand for cigarettes. And the patent inefficacy of the qualified restriction imposed by the City means that truthful commercial speech — speech that is presumptively valuable both to the speaker and to listeners (to adult smokers, if to no one else) — is being suppressed to no effect at all. Indeed, in the absence of proof that the ordinance in fact achieves its stated purpose, it is fair to infer that the City is restricting disfavored speakers or forms of speech "in the service of other objectives that could not themselves justify a burden on commercial suppression." *Edenfield*, 113 S. Ct. at 1800.[13] This Court should make clear that such an approach is impermissible.

2. *The "narrow tailoring requirement.* The court of appeals similarly departed from this Court's precedents in holding that the ordinance is narrowly drawn to produce a reasonable fit between the governmental objective and the means of achieving it. In reaching its conclusion, the Fourth Circuit held that the ordinance is not overbroad because there was no less restrictive means of screening outdoor advertising from minors. See Pet. App. 11a. Neither the City Council nor the court of appeals even considered the "obvious less burdensome alternatives to the restriction on commercial speech." See *Coors*, 115 S. Ct. at 1593-1594. For example, the court refused even to consider the possibility of additional law

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[12] Cincinnati's ban removed 62 newsracks while leaving 1500 to 2000 in place. 113 S. Ct. at 1510. The effect in Baltimore is likely to be comparable. See Ct. App. J.A. 1122-1123, 1128-1136 (examples of cigarette advertising on outdoor signs unaffected by Ordinance 307).

[13] Here, for example, it is possible that the City actually is not concerned with discouraging smoking at all, but instead wants to discourage use of billboards, or wants advertising revenue to be transferred from billboard owners to the operators of MTA buses and sports arenas. Limits on discovery imposed by the courts below — which believed that they needed to consider only the logical nexus between the City's stated means and ends — made it impossible for Penn to explore those possibilities.

enforcement efforts to improve compliance with existing (or new) laws or additional educational efforts to discourage minors from smoking. But entirely apart from the possibility of using alternative methods to advance the City's interest that would not involve the suppression of speech at all the court entirely disregarded this Court's admonition that problems of fit do not arise only from overbreadth. A regulation of speech also may be invalid if it is *underinclusive*.

In *Discovery Network*, the Cincinnati regulation invalidated by the Court, which ostensibly was designed to further the city's interest in safety and esthetics, prohibited newsracks used to distribute commercial fliers, while permitting newspaper newsracks. See 113 S. Ct. at 1508-1509. Observing that commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks" (*id.* at 1514), the Court held that "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It therefore is an impermissible means of responding to the city's admittedly legitimate interests." *Ibid.* (emphasis in original). The Court accordingly held that, "[b]ecause the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding * * * that the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*." *Id.* at 1516.

Precisely the same thing is true here. The legislative record falls far short of establishing that there is any meaningful difference between the signs affected by the ordinance, on the one hand, and the myriad advertisements permitted by the ordinance on buses and taxicabs, at the Camden Yards baseball stadium, and on the exterior walls of the innumerable retail establishments that sell cigarettes. The court of appeals offered no reason to believe — and there is absolutely no evidence establishing — that the approved signs are seen less often by minors or have less of an impact on demand for cigarettes than do the ones proscribed by the ordinance, which are located in the very same areas of the City. And just as the inefficacy of the ordinance suggests that it may advance a hidden purpose, so too the manifest underinclusiveness of the restriction on speech raises the inference that the City is serving other objectives that could not themselves justify a limit on commercial expression. In these cir-

cumstances, the ordinance plainly is invalid under the principle articulated in *Discovery Network*.

II. FEDERAL LAW PREEMPTS THE BALTIMORE ORDINANCE

The court of appeals' rejection of Penn's preemption argument also presents an issue calling for this Court's review. Review is essential because the decision below, if allowed to stand, will upset a complex and carefully balanced legislative compromise struck by Congress. In enacting the Act, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring cigarette packages (and later, cigarette advertisements) to carry health warnings specified by Congress. 15 U.S.C. § 1331. At the same time, Congress acted to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. *Id.*[14] To give effect to this policy of national uniformity, the Act expressly preempts any "requirement or prohibition based on smoking and health * * * imposed under State law with respect to the advertising or promotion of * * * cigarettes * * *." 15 U.S.C. § 1334(b). This provision "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State

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[14] The Congressional declaration of policy and purpose states:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
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> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

or local authority." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969). Baltimore's ordinance is clearly a prohibition of advertising within the scope of the Act, and as such is preempted.

As we have explained (at 5-6 & n.5, *supra*), restrictions on cigarette advertising like those in the ordinance have been adopted or are being considered by states and municipalities across the nation, including many of the country's largest cities. All of those restrictions have been, or are likely to be, challenged on preemption grounds. That makes it imperative for the Court to settle at the earliest possible date the scope of the Federal Cigarette Labeling and Advertising Act's preemption provision. And that is especially so because the Fourth Circuit's decision, which cannot be reconciled with a recent holding of the Second Circuit, has engendered considerable confusion in a heavily regulated and much-litigated area.

1. In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (plurality opinion), this Court held that the central preemption inquiry under the Act tracks the language of the statute: "whether the [predicate] legal duty * * * constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 524. Ostensibly applying this straightforward test, the Fourth Circuit reached the remarkable conclusion that the Act does *not* preempt the ordinance. This conclusion is irreconcilable both with the language of the Act and with the Court's holding in *Cipollone*.

The court of appeals began by stating that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a (emphasis in original). But the notion that the ordinance is a regulation only of "place and manner" (*id.* at 10a) is nonsensical, since Penn and other sign owners are being told what kinds of messages they may put on their signs. Indeed, the restriction on location is determined *entirely* by the sign's content. This Court consistently has viewed such restrictions as content based. See, *e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (prohibition on campaigning within 100 feet of polling place is content based because the right to speak "depends entirely on whether the[ ] speech is related to a political campaign"); *Consolidated Edison Co.* v. *Public Serv.*

Comm'n, 447 U.S. 530 (1980) (rule prohibiting utilities from using bill inserts to discuss political matters is a content-based restriction).

Nor did the Fourth Circuit make any attempt to explain why the distinction it drew (even if that distinction otherwise were intelligible) would have any significance under the preemption provision. In fact, the Act does not differentiate between restrictions directed to the content of cigarette advertisements and restrictions of any other sort. To the contrary, the scope of the preemption provision "reaches beyond statements 'in the advertising'" and instead preempts *all* state regulation based on health concerns "'with respect to the advertising or promotion' of cigarettes." *Cipollone*, 505 U.S. at 520 (plurality opinion). As this Court noted in *Cipollone*, when Congress amended the Act in 1969 it substantially broadened the preemption provision. *Ibid.* As originally enacted, the Act precluded state and local authorities only from requiring "any *statement* * * * relating to smoking and health in the advertising of cigarettes." 15 U.S.C. § 1334(b) (1965) (emphasis added). But the "obviously broader language of the 1969 version extended [the Act's] preemptive reach." *Cipollone*, 505 U.S. at 523 (plurality opinion). In its current form, the Act preempts *any* state or local "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion" of cigarettes.

The Fourth Circuit's inscrutable conclusion that the advertising restriction at issue does not "impose[ ] a duty [ ]or relieve[ ] a burden on cigarette advertisers based on smoking and health" is similarly without basis or explanation. Pet. App. 9a. To the extent it is germane, it is now undisputed that the City Council's enactment of the ordinance *was in fact* based on health concerns, as the City's counsel conceded at oral argument. See Ct. App. Tr. 23 (agreeing with Judge Butzner that the City Council enacted the ordinance out of its "concern[ ] with the health of children"). Indeed, the court of appeals itself acknowledged that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors," and health considerations were a central part of the finding of substantial governmental interest

underlying the panel's First Amendment analysis. Pet. App. 10a.[15] The ordinance thus obviously imposes a burden based on health concerns: it precludes an entire category of cigarette advertising. And by its plain terms, the Act unambiguously "[p]rohibits health-related regulation or prohibition of cigarette advertising." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969).

Finally, the court of appeals relied on its observation that the ordinance has the same "general relationship" to the health effects of smoking as do common law claims for breach of express warranty, fraudulent misrepresentation, and conspiracy, which the *Cipollone* Court held were not preempted by the Act. Pet. App. 9a. In so holding, however, the Fourth Circuit simply disregarded this Court's explanation that such claims "are not predicated on a duty 'based on smoking and health'" but rather on *independent* duties, such as the "duty not to make false statements" of material fact or to conceal such facts. *Cipollone*, 505 U.S. at 528-529. In contrast, of course, the City has conceded that the ordinance is predicated on the relationship between smoking and health. The ordinance is not like an anti-littering restriction that affects all advertising leaflets equally, including those advertising cigarettes, and that might be analogous to a general ban on misrepresentation; instead, it is a prohibition that targets cigarette advertising precisely because of the

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[15] As we note above (at note 2), the court of appeals pointedly did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors. Indeed, the Maryland statute referred to by the City is itself related to smoking and health (see Ct. App. J.A. 1013-1014), and insofar as the purpose of the ordinance is to encourage compliance with the state law, the ordinance must be understood to share the purpose of that law. If, moreover, the ordinance were intended both to serve health concerns and to foster compliance with state law, this Court has held that a state or local regulation is preempted by federal law so long as *one* purpose of the statute is impermissible. *Gade* v. *National Solid Waste Management Ass'n*, 505 U.S. 88 (1992) (state environmental regulation preempted despite the state's assertion of a non-preempted purpose in addition to preempted purpose); *Perez* v. *Campbell*, 402 U.S. 637 (1971) (state may not evade preemption by articulating some purpose other than preempted purpose).

perceived connection between, in the words of the Act, "smoking and health."[16] Preemption therefore is mandated by the Act.

2. The decision below also is of particular importance because it is directly at odds with a careful legislative compromise that lay behind passage of the Act in 1965 and the extension of its preemptive reach in 1969. Congress included the preemption provision in the original version of the Act in 1965 because it recognized that the states were eager to become involved in the regulation of cigarette labeling and advertising, and it was concerned about the effects of such state and local regulation upon "commerce and the national economy."[17] As the termination date of the 1965 Act approached, Congress determined to amend the Act to further protect "commerce and the national economy" from "the chaos created by a multiplicity

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[16] The common law claims that the Court allowed plaintiffs to pursue in *Cipollone* — claims for breach of express warranty and intentional misrepresentation or fraud — were held not to be preempted because, although they could be *applied* to statements made by cigarette manufacturers in their advertising, the duties giving rise to those claims were not themselves based on "smoking and health" but applied generally, regardless of what was being advertised: the justification for those duties was not a concern about the health effects of smoking. By contrast, the Baltimore ordinance is specifically focused on cigarette advertising and is premised on smoking and health concerns. Thus, the Fourth Circuit erred in supposing that the City's billboard advertising ban bore too "general" a relationship to smoking to be "based on smoking and health" within the meaning of the Act; there is simply nothing "general" about the ordinance. Moreover, the *Cipollone* Court emphasized that the common-law claims permitted by the decision would not conflict with Congress' policy of avoiding diverse, nonuniform, and confusing standards. 505 U.S. at 529. On the other hand, allowing each state and local jurisdiction to decide where and in what media cigarette advertisements may appear (in an asserted effort to prevent illegal transactions) brings about the disuniformity that Congress sought to avoid by the preemption provision. See *Sparks* v. *R.J. Reynolds Tobacco Co.*, No. C94-783C (W.D. Wash., Dec. 9, 1994), slip op. 9.

[17] See *Hearings on S. 559 and S. 547 Before Senate Committee on Commerce*, 89th Cong., 1st Sess. 39 (Surgeon Gen. Terry); S. Rep. No. 195, 89th Cong., 1st Sess. 4; 111 Cong. Rec. 14411 (June 22, 1965) (Rep. Springer).

of conflicting regulations." S. Rep. No. 566, 91st Cong., 1st Sess. 1, 12 (1969). In the face of renewed efforts at the state level to regulate or ban cigarette advertising (see *Cipollone*, 505 U.S. at 515 & n.11), Congress crafted a careful and balanced compromise. In addition to strengthening the warning label required on cigarette packages, the 1969 amendments banned cigarette advertising on radio and television. 13 U.S.C. § 1335. At the same time — and related to the ban on radio and television advertising (see *Cipollone*, 505 U.S. at 515) — Congress broadened the preemptive scope of the Act. Its express purpose in doing so was to ensure "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to *any relationship* between smoking and health." 15 U.S.C. § 1331 (emphasis added).[18]

The legislative history of the 1969 amendments demonstrates that Congress intended to preclude any state and local regulation targeted at cigarette advertising. Senator Magnuson, the Senate manager of the conference report, confirmed this interpretation in a colloquy with Senator Cooper in the final Senate floor debate on the conference report. To establish an authoritative interpretation of the legislation, Senator Cooper asked Senator Magnuson whether the Act "preempts the States from *any* action restricting [cigarette] advertising." 116 Cong. Rec. 6640 (1970) (emphasis added). Senator Magnuson's answer was an unequivocal "Yes." *Ibid.*

Any reading of the preemption provision that would permit state or local bodies to ban cigarette advertising — even in the guise of

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[18] *See also Cigarette Advertising and Labeling: Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 103 (1969) (Sen. Magnuson) (advertising issue is "a national matter"); *id.* at 120 (Sen. Goodell) (need for federal preemption "so you don't have to deal with State and local regulations"); *id.* at 130 (Vincent T. Wasilewski, National Association of Broadcasters) ("Congress should not permit unilateral action by the several States"); *id.* at 177 (Sen. Moss) ("This is a national problem and it must be dealt with on a national basis."); *Cigarette Advertising and Labeling: Hearing on H.R. 643, H.R. 1237, H.R. 3055, H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 16 (1969) ("this is the jurisdiction of this Congress and nobody else."); *id.* at 21 (Rep. McMillan); *id.* at 24, 225, 27, 30 (Rep. Fountain).

time, place, and manner restrictions, or in the guise of promoting compliance with other laws — would undermine the purpose of the carefully crafted political compromise embodied in the 1969 amendments: protecting "commerce and the national economy" to the "maximum extent" consistent with the policy of informing the public about the relationship between smoking and health. The Fourth Circuit's view of the Act would produce the very "chaos created by a multiplicity of conflicting regulations" that Congress sought to avoid.

3. Given the patent inconsistency of the decision below with *Cipollone* and the language of the Act, it comes as no surprise that the Fourth Circuit's approach has created an intercircuit conflict. In *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), a post-*Cipollone* decision of the Second Circuit, a company that displays advertisements on New York City taxicabs brought a challenge under the Act's preemption provision to a New York City ordinance that required city-licensed facilities to display at least one anti-smoking message for every four tobacco advertisements displayed. The Second Circuit held the New York ordinance preempted, rejecting many of the arguments raised by the City here.[19]

The Second Circuit was unpersuaded by New York's argument that the ordinance at issue was not one "with respect to the advertising or promotion of any cigarettes" because it "impose[d] no requirements or prohibitions on the content, format or display of cigarette advertisements * * * ." *Id.* at 73. As is true of the Baltimore ordinance, the Second Circuit acknowledged that under the New York City ordinance "the actual cigarette advertisements would not look different," and therefore might not have been preempted under the narrower provision of the 1965 Act. *Id.* at 74. The court found, however, that "the more expansive reach of § 1334(b), as clearly evidenced by its amended language [under the 1969 amendments],

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[19] The plaintiff in *Vango Media* also raised a First Amendment argument. But because the district court held the New York ordinance preempted, that court found it unnecessary to reach the First Amendment issue. And notwithstanding the "patent First Amendment problems with the Local Law" (*Vango Media*, 34 F.3d at 71), the Second Circuit also did not address the constitutional question.

precludes that result." *Id.* Thus, even though the ordinance "treads on the area of tobacco advertising * * * only at the edges * * * it implicates § 1334(b)." *Id.* at 74. In this case, the City has adopted a regulation that does far more than affect cigarette advertising "at the edges." Instead, Ordinance 307 prohibits an entire category of cigarette advertising outright, in an effort to promote public health. The Fourth Circuit's decision that such local regulation can co-exist with the Act is irreconcilable with the Second Circuit's holding in *Vango Media*.

New York also argued in *Vango Media* that the local law "was enacted in light of the economic costs related to smoking, and not on smoking and health considerations." 34 F.3d at 73. But the Second Circuit rejected the notion that it was bound by New York's characterization of the purpose of the ordinance. Instead, the court undertook its own examination of the local law's purpose and concluded that the City Council was motivated by a concern about the effects of smoking on public health. *Ibid.* The same is true here, and the result should be the same: the ordinance must be preempted. Further review therefore is warranted.

4. Finally, we note that the First Amendment issue in this case is similar to the one currently before the Court in *44 Liquormart*; if the constitutional question were the only one presented here, it would be appropriate for the Court to hold this case pending resolution of *44 Liquormart*.[20] But because the preemption claim presents a statutory ground for disposing of the case without the need for further proceedings — and because the meaning of the Act is itself an important issue that warrants this Court's early attention — the

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[20] The constitutional challenge presented here is considerably stronger than the one in *44 Liquormart*, however. The First Circuit's decision in that case to uphold a restriction on price advertising by liquor stores rested in substantial part on the Twenty-First Amendment (see 39 F.3d at 7, 8), a provision that has no bearing in this case. In addition, the court in *44 Liquormart* actually considered the evidence in the record, including that offered at trial by the plaintiffs (see *id.* at 7-8), and found that "there [was] no empirical evidence either way" regarding the effectiveness of the advertising restriction. *Id.* at 7. Here, of course, the court of appeals considered such evidence irrelevant.

Court may wish to grant review (at least of the preemption issue) without awaiting the disposition of *44 Liquormart*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
GARY A. ORSECK
H. THOMAS BYRON III
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

NOVEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE,

Amici Curiae.

No. 94-2141

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, Senior District Judge. (CA-94-877-HM)

Argued March 6, 1995.

Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, Circuit Judge:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on

"outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising p'ays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of

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[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the

Central Hudson test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiary record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the questions presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court noted in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, —, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by Central Hudson. We decided the same question in the companion case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch*:

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject

> legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.* at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone* v. *Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common

law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at ---, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at ---, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at ---, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at ---, 112 S.Ct. at 2622. *See also Vango Media, Inc.* v. *City of New York,* 34 F.3d

68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in Cipollone to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in Cipollone could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at ---- - ----, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp.1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc.* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when "'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.'" *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore* v. *Sitnick*, 254 Md. 303, 323,

255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307

directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States* v. *Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson's* third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying Central Hudson's third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson's* fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon

> altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PENN ADVERTISING OF BALTIMORE, INC.

v.

THE MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, ET AL.

Civ. No. HM-94-877.

Aug. 11, 1994.

MEMORANDUM

HERBERT F. MURRAY, Senior District Judge.

I. INTRODUCTION

Baltimore City Ordinance 307 (Council Bill No. 627) (hereinafter "Ordinance 307") was signed into law by Mayor Kurt L. Schmoke on March 7, 1994. This Ordinance prohibits cigarette advertising on billboards located in certain designated zones within Baltimore City. Plaintiff Penn Advertising of Baltimore, Inc. (hereinafter "Penn") is the owner of billboards located within these zones of prohibition. By its terms Ordinance 307 was to take effect on the 30th day after the date of its enactment. On the thirtieth day after enactment of Ordinance 307, Penn brought this action against defendants The Mayor and City Council of Baltimore, Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City, and David Tanner, in his official capacity as General Superintendent of Zoning Administration and Enforcement of Baltimore City (hereinafter collectively referred to as "the City"). Penn seeks injunctive and declaratory relief.

In its complaint, Penn states three separate grounds upon which it seeks judgment. Penn first claims that Ordinance 307 is in violation of the First Amendment's protection of free speech. Second, Penn claims that Ordinance 307 is pre-empted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act. Lastly,

Penn claims that Ordinance 307 is pre-empted by Maryland State law.

On April 26, 1994, in lieu of filing an answer to Penn's complaint, the City filed a Motion to Dismiss, or in the Alternative, for Summary Judgment.[1] Penn responded by filing a Memorandum in Opposition. After reviewing the parties' memoranda and exhibits, this Court has determined that no hearing is necessary and is prepared to rule on the merits of the City's motion.

II. MOTION FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure permits a grant of summary judgment only if no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The burden is on the moving party to demonstrate the absence of such issues of material fact. For the purposes of deciding the present motion, this Court must construe all facts and reasonable inferences in favor of the plaintiff. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

In opposition to summary judgment, however, a party must proffer more than "a mere scintilla of evidence" to raise a genuine issue of material fact. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. Although not weighing the evidence or determining the truth for the purposes of these motions, the Court must consider "whether reasonable jurors could find by a preponderance of the evidence that [the non-moving party] is entitled to a verdict." *Id.* at 249, 252, 106 S.Ct. at 2510, 2512.

Despite Penn's assertions to the contrary, this Court concludes, after careful review of the pleadings and exhibits, that there is no genuine dispute of material fact in this case, and that the questions presented by plaintiff's Complaint are legal questions ripe for decision by this Court.

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[1] Because the Court has considered matters outside of the pleadings, the Court will not rule on the City's motion to dismiss, but rather on the City's alternative motion for summary judgment.

While Penn asserts that the parties vigorously dispute factual matters, this is not so. The parties vigorously dispute questions of law and it is proper for this Court to decide these questions. There are no factual issues to be decided because this case concerns a facial attack on the legal sufficiency of an ordinance. An example of Penn's mischaracterization of legal issues as factual ones is Penn's statement that "it should at least be clear . . . that the question of whether Ordinance 307 is a prohibition or requirement based on smoking and health is something about which Plaintiff and Defendants sharply disagree." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 9. While the parties do disagree on this issue, that disagreement is not relevant to the determination of whether summary judgment is appropriate because it concerns a legal question which is properly decided by this Court. Similarly, Penn's memorandum contains lengthy legal arguments in support of each of Penn's claims. At the end of each of these legal arguments, Penn asserts that a dispute of fact is involved. But Penn does not direct this Court to any such factual disputes; rather, Penn simply argues the law. This Court finds that there are no genuine disputes of material fact present in this case. Therefore, the Court will rule on the legal issues presented in the parties' memoranda.

A. Ordinance 307 is Constitutional

While it is true that "the First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation," *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (citing *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761-762, 96 S.Ct. 1817, 1825-1826, 48 L.Ed.2d 346 (1976)), it is also well-settled that "commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

The appropriate test for assessing the constitutionality of restrictions on commercial speech was established by the Supreme Court in *Central Hudson*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351 (1980).

In the instant case, the parties agree that the advertising in question is neither unlawful nor misleading, thereby satisfying the first prong of the *Central Hudson* test. The parties vigorously dispute whether the ordinance complies with the second, third and fourth prongs of the test.

1. The Second Prong: Substantial government interest

In order to satisfy the second prong of the *Central Hudson* test, the City must demonstrate a substantial government interest which the City seeks to achieve by its promulgation of Ordinance 307. The asserted interest of the City, as stated in both its memorandum and in the Preamble to Ordinance 307, is to promote compliance with the state law prohibition against the sale of cigarettes to minors, Md.Ann.Code art. 27, § 404 (1992), thereby also furthering the obvious public policy underlying this prohibition which is to prevent the purchase, and thus the consumption, of cigarettes by minors. This is certainly a sufficiently substantial interest for the purposes of the *Central Hudson* test.

Article 27, § 404 of the Maryland Code declares that "it is unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). While, as Penn asserts, a minor does not commit an act expressly prohibited by § 404 by purchasing cigarettes, the person selling the cigarettes to a minor is committing an act expressly prohibited by this ordinance. Thus, if the number of minors seeking to purchase cigarettes decreases, the number of transactions in violation of § 404 will also decrease. Ordinance 307 represents a legislative

judgment by the Baltimore City Council that a reduction in the exposure of minors to stimuli encouraging the purchase of cigarettes will result in fewer minors seeking to purchase cigarettes and therefore fewer illegal transactions. Furthermore, the public policy behind § 404 of preventing the purchase, and thus the consumption, of cigarettes by minors would be advanced as well.

The City has a substantial interest both in promoting compliance with § 404 and in advancing the public policy which underlies § 404. Therefore, the second prong of the *Central Hudson* test is satisfied.

2. The Third Prong: Does Ordinance 307 directly advance this substantial interest?

In *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (holding that a Florida ordinance prohibiting Certified Public Accountants from in-person solicitation was an unconstitutional restraint on free speech), the Supreme Court elaborated upon the third prong of the constitutionality test for restrictions on commercial speech first set forth in Central Hudson. The Court stated that to withstand a First Amendment challenge, the state must demonstrate that "its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at —, 113 S.Ct. at 1799. The Court also cautioned that the state's burden

> is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.

Id. at —, 113 S.Ct. at 1800.

The City maintains that the Court's Edenfield ruling does not modify the "intermediate level"[2] of scrutiny that had been

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[2] The Court reaffirmed its view that an intermediate level of scrutiny is applicable to First Amendment challenges to restrictions on commercial speech in Discovery Network where the Court required a more searching inquiry than rational basis review, but one less rigorous than least restrictive means. *Cincinnati* v.

applicable to challenges to restraints on commercial speech prior to *Edenfield* and that the same deference should be afforded the legislature that had been prior to *Edenfield*. An example of this judicial deference is found in the deference the Supreme Court has given a legislature's judgment that a link exists between billboards and traffic safety in repeated litigation over the placement of billboards. In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), for example, the Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, stating that "[w]e likewise hesitate to disagree with the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509, 101 S.Ct. at 2893 (footnote omitted).

The City urges the Court to defer to the legislative judgment that the connection between advertising and consumption is "self-evident" as the Supreme Court and lower courts had done prior to *Edenfield*. *See, e.g., Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("The Puerto Rico Legislature obviously believed that advertising of casino gambling . . . would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one."); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales."); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (Deferring to a legislative judgment linking alcohol advertising and consumption in upholding a prohibition against the broadcasting of advertisements for alcoholic beverages); *Dunagin* v. *Oxford*, 718 F.2d 738 (5th

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Discovery Network, Inc., — U.S. —, — n.13, 113 S.Ct. 1505, 1510 n.13, 123 L.Ed.2d 99 (1993).

Cir.1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984) ("We hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban [on local liquor advertising], whether or not 'concrete scientific evidence' exists to that effect.").

Penn asserts that the Supreme Court's opinion in *Edenfield* has altered the level of scrutiny with which the Court is to examine a restraint on commercial speech. According to Penn, the Court should no longer apply an intermediate level of scrutiny. Penn asserts that after *Edenfield*, the City must satisfy "a serious and substantial burden of proof . . . that requires a fact-intensive inquiry that cannot be resolved through summary judgment." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 25. Under this more difficult test, Penn asserts that it is inappropriate for this Court to accept the judicially-recognized proposition that advertising increases consumption as sufficient to sustain the City's burden and thus that it is inappropriate for this Court to grant the City's motion for summary judgment.

Penn raised substantially the same argument in *Anheuser Busch, Inc. and Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 855 F.Supp. 811 (D.Md.1994) (hereinafter *Penn I*). *Penn I* involved a First Amendment challenge to an ordinance very similar to Ordinance 307, except the ordinance challenged in *Penn I* prohibited alcohol advertising on billboards located in areas that would cause minors to be exposed to such advertising, whereas Ordinance 307 prohibits cigarette advertising on similarly-situated billboards. Judge Hargrove in *Penn I* did not accept the increased level of scrutiny for commercial speech restrictions which Penn asserted makes it inappropriate for the Courts to defer to a legislative judgment that advertising increases consumption. Rather, Judge Hargrove concluded that *Edenfield* did not change the requisite level of scrutiny:

> This Court . . . is unable to find any language in *Edenfield* that specifies the precise level of scrutiny with which this Court must review the Ordinance. *Edenfield* requires only that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Penn I, 855 F.Supp. at 815 (quoting *Edenfield*, — U.S. at —, 113 S.Ct. at 1800). This Court finds Judge Hargrove's analysis persuasive.

In *Penn I*, Judge Hargrove relied on *United States* v. *Edge Broadcasting Co.*, — U.S. —, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), a Supreme Court decision that followed soon after the Court's *Edenfield* decision, to support his position. In *Edge*, the Court upheld a federal statute prohibiting radio broadcast of lottery advertising by licensees located in non-lottery states against a First Amendment challenge to restrictions on commercial speech. In doing so, the Court "affirmed the role of judicial deference to legislative judgments in the area of commercial speech." *Penn I*, 855 F.Supp. at 815. The Court acknowledged the propriety of judicial deference to a legislative judgment that advertising increases consumption, stating that

> Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.

Edge, — U.S. at —, 113 S.Ct. at 2707.

Penn cites *Cal-Almond, Inc.* v. *United States Dep't of Agric.*, 14 F.3d 429 (9th Cir.1993) (holding that a governmental program that required individual almond growers to pay assessments for government-sponsored advertising was an unconstitutional restriction on commercial speech), *Coors Co.* v. *Bentsen*, 2 F.3d 355 (10th Cir.1993) and *Hornell Brewing Co.* v. *Brady*, 819 F.Supp. 1227 (E.D.N.Y.1993), in support of their assertion that the federal courts that have recently been presented with this issue have refused to follow the judicially-recognized principle that advertising increases consumption. Despite Penn's contentions, none of these cases actually support this proposition.

Judge Hargrove in *Penn I* actually cited *Cal-Almond* in support of the opposing position. In *Cal-Almond*, the Ninth Circuit considered the impact of the recent Supreme Court decisions

involving commercial speech on *Central Hudson* and concluded that it was still appropriate to adhere to the judicial recognition that a link exists between advertising and consumption. While acknowledging the Court's general instruction in *Edenfield* to evaluate the government's interests and the harms it seeks to avoid, the Court noted that "the Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . . Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand." *Cal-Almond*, 14 F.3d at 439 (citations omitted).

While the Court went on to complete a more searching inquiry into the success of the Board's advertising efforts, the Court did so because the issue presented was not merely whether the Board's advertising efforts had increased demand. Rather, the relevant issue, whether "the generic Board promotion . . . sells almonds more effectively than the specific, targeted marketing efforts of individual handlers," required the Court to "compare it [the increase in demand caused by the Board's promotional campaign] to a situation where handlers spent their assessments on their own marketing." *Id.* at 439.

In *Coors*, the Tenth Circuit held that a regulation prohibiting statements of alcohol content on malt beverage labels violated the First Amendment. The government contended that the purpose of the regulation was to prevent strength wars among competing manufacturers. In invalidating the regulation, the Court noted that "[t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars." *Coors*, 2 F.3d at 358. The Court found that

> the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars . . . . Instead, it has offered only inferential arguments that are based on mere speculation and conjecture.

Id. at 359. Judge Hargrove noted that the link the government sought to establish in *Coors* "is, at best, tenuous." *Penn I*, 855 F.Supp. at 817.

In *Hornell*, the Court held that legislation prohibiting the use of the name "Crazy Horse" on alcoholic products was in violation of the First Amendment's protection of commercial speech because it did not directly advance the government's substantial interest in preventing the enhanced appeal of alcohol use among Native Americans. The government's argument was "based on the premise that the use of the name Crazy Horse will stimulate demand for malt liquor in Native American Communities." *Hornell*, 819 F.Supp. at 1235. While the Court refused to defer to the legislature's judgment and accept the government's premise without evidence to support it, the Court was careful to distinguish *Hornell* from *Posadas*, noting:

> Furthermore, in *Posadas*, the Court was able to defer to the legislature on the basis of precedent . . . that established the causal relationship between advertising and consumption . . . . Here, there is no comparable precedent that suggests, let alone establishes, an immediate connection between the use of one specific Native American name, Crazy Horse, and increased consumption of alcohol by Native Americans. The government asks the Court to make a leap of faith and logic on this point.

Id. at 1237.

The situations presented in *Cal-Almond*, *Coors* and *Hornell* differ greatly from the one currently before this Court. In *Cal-Almond*, the government sought to show, not merely that advertising increases consumption, but that "a government agency is better at marketing [almonds] than an individual business person." *Cal-Almond*, 14 F.3d at 439. In *Coors*, the government sought to establish a link between factual statements of alcohol content on malt beverage labels and strength wars. In *Hornell*, the government sought to establish a link between use of the name Crazy Horse and enhanced demand for malt liquor in Native American Communities. In all three cases, the government sought to establish a proposition that was, at best, tenuous. In all three cases the government asked the Court to accept mere speculation and conjecture as sufficient to satisfy their *Central Hudson* burden of demonstrating that the regulation in question directly advanced the asserted substantial governmental interest. In the case currently before this Court, the City urges this Court to accept the

proposition that advertising increases consumption. This link is "more immediately apparent," *Penn I*, 855 F.Supp. at 817, and is a long-standing, judicially-recognized proposition. *See, e.g., Posadas*, 478 U.S. at 342, 106 S.Ct. at 2977; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Dunagin*, 718 F.2d 738; *Edge*, — U.S. —, 113 S.Ct. 2696.

Penn also asserts that it is inappropriate to accept the judicially-recognized proposition that advertising increases consumption because the purpose of cigarette advertising is not to increase overall consumption but merely to increase the advertiser's market share of an already established pool of smokers. Penn also raised this argument in *Penn I* as it relates to alcohol. Judge Hargrove did not find Penn's position persuasive and adequately addressed their argument in *Penn I*. His reasoning regarding the market share argument is as applicable to cigarette sales as it is to alcohol sales.

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what business person stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society.

Penn I, 855 F.Supp. at 818 (quoting *Dunagin*, 718 F.2d at 749).

This Court holds that it remains appropriate in the wake of *Edenfield* to accept the judicially-recognized proposition that advertising increases consumption. Furthermore, if advertising increases consumption among the general population, it is also reasonable to accept the proposition that advertising increases consumption among youths. If anything, this statement may be more applicable to the youthful population than to the adult population due to the impressionable nature of youngsters.

As the Supreme Court reasoned in *Edge*, an opinion in which the Court accepted the legislative judgment that advertising increases consumption,

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising . . . . In our view, the restriction . . . directly advances the governmental interest within the meaning of *Central Hudson*.

Edge, — U.S. at —, 113 S.Ct. at 2707. Similarly, if there is an immediate connection between advertising and demand among minors, as has already been established, and Ordinance 307 decreases cigarette advertising, as it does, it stands to reason that the demand for cigarettes among minors will decrease. If the demand for cigarettes among minors decreases, the City's policy of preventing transactions which violate § 404 and discouraging the purchase and consumption of cigarettes by minors is advanced. Thus, Ordinance 307 does directly advance the City's asserted substantial interest and passes the third prong of the *Central Hudson* test.

3. The Fourth Prong: Is Ordinance 307 narrowly tailored to serve the City's asserted substantial interest?

In *Board of Trustees* v. *Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court explained that the fourth prong of the *Central Hudson* test requires only a reasonable fit between the regulation and the interest it is meant to serve for the challenged regulation to pass constitutional muster:

> What our decisions require is a "fit" between the legislature's ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental

> decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (internal quotations and citations omitted).

In declining to impose a "least restrictive means" requirement, the Court noted that in doing so it was taking "account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires" and providing "the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to government regulation.'" *Id.* at 481, 109 S.Ct. at 3035 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 455-56, 98 S.Ct. at 1918-19). In *Penn I*, Judge Hargrove explained that "[a]n intermediate level of scrutiny thus recognizes the latitude that decisionmakers require to address widespread social problems." *Penn I*, 855 F.Supp. at 819.

In *Edenfield*, the Court further elaborated upon why a reasonable fit requirement is appropriate. The Court reasoned:

> Commercial speech . . . is linked inextricably with the commercial arrangement that it proposes, . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. . . . For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

Edenfield, — U.S. at —, 113 S.Ct. at 1798.

Penn asserts, as it did in *Penn I*, that Ordinance 307 is not narrowly tailored to serve the City's substantial interest in preventing the purchase and consumption of cigarettes by minors. Penn argues that Ordinance 307 is underinclusive because it prohibits only a small percentage of total advertisements for the product, leaving many other mediums, such as newspapers, magazines, signs inside stores which sell cigarettes, advertisements on the storefronts of businesses that sell cigarettes and on the inside and outside of MTA busses, unrestricted. Penn cites *City of Cincinnati* v. *Discovery Network, Inc.*, — U.S. —, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), in support of this contention.

In *Discovery Network*, the Supreme Court invalidated a city ordinance because no reasonable fit existed between the regulation and the city's asserted interest. Motivated by its concern for safety and aesthetics, the city used a pre-existing ordinance, which prohibited distribution of "commercial handbills" on public property, to remove 62 newsracks containing commercial handbills while leaving between 1,500 and 2,000 similar newsracks that contained noncommercial speech untouched. The Court held that there was no reasonable fit because the city offered no legitimate justification for distinguishing between the newsracks that contained commercial speech and those that contained noncommercial speech. As the Court explained,

> the city's primary concern . . . is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.

Discovery Network, — U.S. at —, 113 S.Ct. at 1514. The only justification the city offered for this differentiation between newsracks was the fact that commercial speech receives a somewhat lower level of First Amendment protection than noncommercial speech. The city argued that this fact alone allows the prohibition of commercial speech while allowing noncommercial speech that is equally harmful to the city's asserted interest to remain untouched. In response to this argument, the Supreme Court stated:

> the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems. In Bolger, however, in rejecting 'offensive' speech, [we] specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.

Discovery Network, — U.S. at —, 113 S.Ct. at 1515 (internal quotations and citations omitted). The Court further elaborated on this point, stating: "the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly

legitimate interests." *Discovery Network*, --- U.S. at ----, 113 S.Ct. at 1514.

In the instant case, there are legitimate justifications related to the city's substantial interest for distinguishing between billboards and the other types of mediums which the ordinance does not affect. The distinction between the permitted and prohibited forms of advertising rests on the effect that different mediums have on adolescents.

Judge Hargrove in *Penn I*, in describing the very same billboards that are the subject of this litigation, stated:

> a billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Furthermore, despite protestations to the contrary, the reality is that billboard advertisements for alcoholic beverages focus on depressed inner-city neighborhoods. Billboards are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them thereby enhancing the attractiveness of the advertised product.

Penn I, 855 F.Supp. at 822. Judge Hargrove's insights are equally applicable to cigarette advertising on these same billboards. Relying on *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), which held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives was in violation of the First Amendment, Penn argues that the City "cannot deprive adults of commercial information concerning cigarettes simply because the City believes that minors should not be exposed to such information." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 44.

Penn advanced the same argument as it relates to alcohol advertisements in *Penn I*. Judge Hargrove concluded in *Penn I* that Penn's argument had no merit. This Court finds his reasoning persuasive. Judge Hargrove addressed Penn's argument by noting that:

> In *Bolger*, however, the Supreme Court recognized that the governmental interest in protecting children may in some

> instances justify special treatment. Citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726 [98 S.Ct. 3026, 57 L.Ed.2d 1073] (1978), which upheld a restriction on broadcasting in order to protect children, the Court emphasized the narrowness of the holding based on the uniquely pervasive and accessible nature of the broadcasting medium. In distinguishing *Bolger* from *Pacifica*, the Court found that the receipt of mail is far less intrusive and uncontrollable than broadcasting. The Court noted that parents already exercise substantial control over mail once it enters their mailboxes and are entitled under a federal statute to limit their receipt of sexually provocative material. Therefore, an additional regulation prohibiting unsolicited advertisements on contraceptives was unnecessary.

Penn I, 855 F.Supp. at 820 (internal quotations and citations omitted).

Judge Hargrove went on to note that "As in the broadcasting context, parents are similarly unable to control their children's exposure to outdoor billboard advertisements." *Id.* at 820. As the Supreme Court explained in *Packer*,

> There is a difference which justifies the classification between display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class by themselves . . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed . . . .' The legislature may recognize degrees of evil and adapt its legislation accordingly.

Packer Corp. v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274-75, 76 L.Ed. 643 (1932) (citing *State* v. *Packer Corp.*, 77 Utah 500, 297 P. 1013, 1019 (1931)). Thus, there is a legitimate justification relating to the City's asserted interest for differentiating billboards from other types of media which are less accessible to children and to which parent's can control their children's exposure, media such as newspapers, magazines and signs inside stores which sell cigarettes.

There is also a legitimate reason in line with the City's asserted interest for differentiating between the restricted billboards and advertisements on the storefronts of businesses that sell cigarettes. The Supreme Court addressed this issue in *Discovery Network* in their discussion of *Metromedia*. The Court explained that "the offsite-onsite distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations." *Discovery Network*, --- U.S. at ---- n. 20, 113 S.Ct. at 1514 n.20 (internal quotations and citations omitted). In rejecting a similar argument, the Fifth Circuit in *Dunagin* stated "the restrictions permit certain types of informational advertising of use to the consumer . . ., but bar those displays that it believes will encourage excess consumption." *Dunagin*, 718 F.2d at 751. The reasoning of the Supreme Court and the Fifth Circuit also applies to the case now before this Court. The City seeks to prevent the exposure of minors to advertisements that will increase their demand for cigarettes. They do not seek to hide the locations of establishments that sell cigarettes, thereby placing obstacles in the way of adult smokers seeking to purchase cigarettes and harming local businesses. The restriction on billboard advertisements substantially promotes the City's goal by banning a particularly large and attention-attracting medium that the City believes will stimulate demand among minors. Ordinance 307 accomplishes this while not unnecessarily interfering with local businesses or adult smokers by prohibiting the smaller on-site advertisements that likely have less influence on youngsters and serve a commercial and public interest by informing adult smokers of where cigarettes may be purchased.

As the Supreme Court stated in *Edge*:

> Nor do we require that the government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge, — U.S. at —, 113 S.Ct. at 2707. Therefore, this Court would not find Ordinance 307 unconstitutional even if several of the unrestricted mediums of which Penn complains were not easily distinguishable from billboards because the City need not make progress on all fronts before attempting to make progress on any. Furthermore, the government has made progress on other fronts more similar to billboard advertising than the unrestricted mediums. This can be seen in the Public Health Cigarette Smoking Act of 1969, 15 U.S.C.A. § 1335 (1970), which prohibits cigarette advertising on any medium of electronic communication, and in Executive Order No. 01.01.1993.33 signed by Governor Schaefer on December 20, 1993, Md.Reg., Vol. 21, Issue 1, pg. 14 (Jan. 7, 1994 issue), which prohibits the renewal of contracts for cigarette advertisements on MTA busses. In banning cigarette advertisements on television, radio and MTA busses, these restrictions place prohibitions on similar types of mediums to the billboards restricted by Ordinance 307. All of the restricted mediums are unusually accessible to and influential on minors and parents lack control over their children's exposure to each.

Penn also claims that Ordinance 307 is underinclusive because the restrictions on billboard advertising will only lead to an increase in cigarette advertising in the mediums remaining unrestricted, thus frustrating the City's asserted purpose of decreasing the exposure of minors to cigarette advertising. The Court is not persuaded by this argument. Penn has given no reason to accept this proposition beyond its unsubstantiated assertion. Even if the Court were to accept Penn's proposition, the City's asserted substantial interest would still be forwarded unless the advertising budget of tobacco companies shifted its focus from billboards to unrestricted mediums that are as accessible to and influential on minors as billboards and to which parents similarly have little control over the exposure of

their children. With the bans on advertisement in the electronic media and on MTA busses, it seems most improbable that such a hypothesized shift would increase advertising in such areas.

Penn further argues that Ordinance 307 fails to satisfy the fourth prong of the *Central Hudson* test because alternative, less burdensome means exist to decrease the purchase and consumption of cigarettes by minors, such as increased enforcement of the existing prohibition of cigarette sales to minors. But as Judge Hargrove stated in *Penn I*:

> The mere suggestion of alternatives, however, does not conclusively establish that the City's chosen means are not narrowly tailored; a reasonable fit is all that is necessary: 'A judge need not agree with the decisionmaker as to the most appropriate method for promoting a governmental interest; as long as there is a reasonable fit between the restriction and the interest served, the manner of regulation is left to the decisionmaker.' In other words, although consideration of alternatives is an element of 'reasonable fit,' it is not dispositive.

Penn I, 855 F.Supp. at 819 (quoting *Destination Ventures* v. *F.C.C.*, 844 F.Supp. 632, 638 (D.Or.1994) (citations omitted)). This Court holds that the City's chosen means are narrowly tailored to advance the City's asserted interest of decreasing the exposure of minors to stimuli that would encourage them to purchase cigarettes, thereby decreasing the number of illegal transactions and discouraging the purchase and consumption of cigarettes by minors. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[3] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements, while leaving

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[3] The eleventh exception to Ordinance 307 makes the ordinance inapplicable in the zoned areas described above.

other mediums, such as newspapers, magazines, and signs inside licensed premises, which do not cause these specific problems, unrestricted. Also left unrestricted are signs outside premises which sell cigarettes, thus allowing licensed distributors of cigarettes to identify themselves and their wares. For all these reasons, this Court holds that Ordinance 307 satisfies the fourth prong of the *Central Hudson* test.

Having determined that Ordinance 307 has satisfied all four prongs of the *Central Hudson* test, this Court holds that Ordinance 307 does not violate the First Amendment. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

B. Ordinance 307 is not pre-empted by the Federal Cigarette Labeling and Advertising Act

1. Pre-emption Analysis: Generally

Article VI of the Constitution provides that the laws of the United States "shall be the supreme law of the land; any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus, since the Supreme Court's decision in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with Federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). Pre-emption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, "'the purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)).

The Supreme Court further elaborated upon the proper approach to issues arising under the Supremacy clause in its opinion in *Cipollone* v. *Liggett Group, Inc.*:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law

> is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Cipollone v. *Liggett Group, Inc.*, — U.S. —, —, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (internal quotations and citations omitted).

2. History of the Federal Cigarette Labeling and Advertising Act

The Surgeon General convened an advisory committee in 1962 to examine the issue of whether there was a link between smoking and illness. In 1964, the advisory committee issued its report, which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Educ. and Welfare, U.S. Surgeon General's Advisory Comm., Smoking and Health 33 (1964). Following this report, the Federal Trade Commission (FTC) and several states separately moved to regulate the advertising and labeling of cigarettes. *See, e.g.*, 29 Fed.Reg. 8325 (1964); 1965 N.Y.Laws, ch. 470; *see also* 111 Cong.Rec. 13900-13902 (1965) (statement of Sen. Moss).

This activity led Congress to enact the Federal Cigarette Labeling and Advertising Act (FCLAA) in July 1965. Pub.L. 89-92 (1965), 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340 (hereinafter the "1965 Act"). In Section 2, the 1965 Act declared its competing dual purposes: (1) adequately informing the public that cigarette smoking may be hazardous to your health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations. Pub.L. 89-92, § 2 (1965), 79 Stat. 282, as amended, 15 U.S.C. § 1331(2). In furtherance of its first purpose, the 1965 Act required the warning statement "Caution: Cigarette Smoking May Be Hazardous to Your Health" on cigarette packages. Pub.L. 89-92, § 4 (1965), 79 Stat. 283. In recognition of its second purpose, the 1965 Act explicitly preempted FTC and state regulation by specifying that "no statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package," and that until July

1, 1969, "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at §§ 5, 10.

The *Public Health Cigarette Smoking Act of 1969*, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340, (hereinafter the "1969 Act"), strengthened the warning label, changing the warning message to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health," and prohibited cigarette advertising on television and radio. In addition, the pre-emption clause of the statute was changed to its present form: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub.L. 89-92, § 5(b) (1965), 79 Stat. 283 (codified at 15 U.S.C. § 1334(b)).

Federal cigarette labeling and advertising regulation reached its present form through the *Comprehensive Smoking Education Act*, Pub.L. 98-474, 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1331-1341) [hereinafter the "1984 Act"]. This act changed the warning format to a rotation of four different warning messages and extended the warning requirement to cigarette advertisements.

3. Analysis

The Supreme Court first addressed the question of the pre-emptive reach of the FCLAA in *Cipollone* v. *Liggett Group, Inc.*, — U.S. —, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). In *Cipollone*, the son of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984, attempted to recover damages for her death from the defendant cigarette manufacturers on the basis of several state common law claims. Cipollone claimed that the defendants had breached express warranties contained in their advertising, failed to warn consumers about the hazards of smoking, fraudulently misrepresented those hazards to consumers and conspired to deprive the public of medical and scientific information about smoking. Defendants argued that the state law claims were pre-empted by the FCLAA. The Court held that the 1965 Act did not pre-empt any of Cipollone's claims. The plurality

held that the 1969 Act pre-empted Cipollone's claims that were based on a failure to warn and the neutralization of federally mandated warnings to the extent such claims relied on omissions or inclusions in the tobacco manufacturer's advertising while not pre-empting those claims that were based on express warranty, intentional fraud and misrepresentation, or conspiracy theories.

In order for the *Cipollone* Court to rule, the Court necessarily undertook a thorough analysis of the pre-emptive reach of the 1965 and 1969 Acts. While the 1969 Act broadened the pre-emptive reach of the 1965 Act, *Cipollone*, at ––– - –––, 112 S.Ct. at 2619-21, the 1984 Act did not alter the 1969 Act with respect to pre-emption. Thus, the pre-emptive scope of the FCLAA has not changed since the 1969 Act. Therefore, the Court's discussion of the pre-emptive scope of the 1969 Act establishes the relevant standard of inquiry for the instant case. This is the only portion of the Court's analysis that is germane to the instant case.

In arriving at its conclusions concerning whether Cipollone's claims were pre-empted, the Court held that "the pre-emptive scope of the . . . 1969 Act is governed entirely by the express language in § 5 of [the] Act." Id. at –––, 112 S.Ct. at 2618. The Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the . . . [Act] offer no cause to look beyond § 5 of [the] Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Id. at –––, 112 S.Ct. at 2618.

The Court further elaborated on the standards for considering the pre-emptive power of § 5(b) of the 1969 Act: "we must fairly

but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted." *Id.* at —, 112 S.Ct. at 2621. Justice Stevens, with the support of a plurality of the Court, explained that the applicable inquiry in determining whether a claim is pre-empted by the 1969 Act is

> whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law . . . with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading. . . . [E]ach phrase within that clause limits the universe of common law claims preempted by the statute.

Id. at —, 112 S.Ct. at 2621.

Now that the applicable standards of inquiry into the pre-emptive scope of the 1969 Act, as dictated by the Supreme Court in *Cipollone*, have been established, this Court may now analyze the claims before it. Penn claims that Ordinance 307, a prohibition imposed under State law which regards advertising, is based on smoking and health and is therefore pre-empted by the FCLAA. Penn arrives at this conclusion on three bases. First, Penn argues that Article 27, § 404 is based on smoking and health because the precursor to § 404, an 1886 Maryland law banning sale of cigarettes to minors, recites that it is an "AN ACT TO PROTECT THE HEALTH AND MORALS OF MINORS . . . ." The City asserts that Ordinance 307 was promulgated with the purpose of further effectuating § 404. Penn argues that because § 404 is based on smoking and health, an ordinance meant to further § 404 is also based on smoking and health.

Even if this Court were to accept Penn's assertion that § 404 is based on smoking and health,[4] this Court would still not accept

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[4] The language of the preamble to the 1886 Act may well be nothing more than a statement of legislative authority. The "health and morals" formulation is one which is routinely used by legislatures in invoking state police powers. There is no legislative history available to determine whether health concerns were in fact

Penn's argument. The underlying purpose of § 404 is irrelevant to this analysis. The validity of § 404 has not been challenged, nor could it be challenged. It is certainly within the City's power to pass a law meant to effectuate a valid State law.

It is clear that Ordinance 307 is such a law. The purpose of Ordinance 307 is to further effectuate § 404, a valid State law. The Preamble to Ordinance 307 cites § 404 as the impetus for its promulgation along with abundant statistics concerning the prevalence of underage smoking to demonstrate the necessity of Ordinance 307 as a means to increase the effectiveness of § 404. Furthermore, Ordinance 307 is obviously designed to accomplish this goal. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[5] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements. Ordinance 307 has no effect upon other mediums which do not cause these specific problems, such as newspapers, magazines, and signs inside licensed premises. Ordinance 307 is clearly aimed at the illegal sale of cigarettes to minors. Its purpose is to effectuate § 404 and, therefore, Ordinance 307 is not "'based on smoking and health . . .' giving that clause a fair but narrow reading." Id. at —, 112 S.Ct. at 2621.

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an issue in first enacting the ban on sale of cigarettes to minors. It is clear, however, that "[a]lthough physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. *Cipollone* at —, 112 S.Ct. at 2615 (citing U.S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 years of Progress 5 (1989).

[5] See note 3.

This holding is in line with the holding of the Supreme Court in *Cipollone*. In *Cipollone*, the Court held that Cipollone's claims of intentional fraud and misrepresentation were not pre-empted because they were not "'based on smoking and health' but rather on a more general obligation— the duty not to deceive." *Id.* at —, 112 S.Ct. at 2624. The Court further held that Cipollone's conspiracy claim was not pre-empted because "this duty . . . is not a prohibition 'based on smoking and health' as that phrase is properly construed," *Id.* at —, 112 S.Ct. at 2624, but, rather, it is based on a more general duty—the duty not to conspire to commit fraud. Similarly, Ordinance 307 is not "based on smoking and health" but rather on a more general obligation—the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions. This more general obligation underlying Ordinance 307 is also reflected in Baltimore Ordinance 262 which limits billboard advertisements for alcoholic beverages.

The Court reasoned that this interpretation of the phrase "smoking and health" was appropriate for two reasons: (1) "Congress intended the phrase 'relating to smoking and health' to be construed narrowly, so as not to proscribe the regulation of deceptive advertising;" *Id.* at —, 112 S.Ct. at 2624, and (2) this interpretation of "based on smoking and health"

> is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state law obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity.

Id. at —, 112 S.Ct. at 2624. Thus, the Court concluded that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at —, 112 S.Ct. at 2624. Accordingly, the Court held that Cipollone's claim was not pre-empted. The Court went on to note that this reasoning was equally applicable to Cipollone's conspiracy claims and held that these claims were also not pre-empted.

Likewise, this interpretation of the phrase "smoking and health" is appropriate in the instant case for the same reasons. A narrow construction of the phrase "smoking and health" is appropriate because Congress did not intend to interfere with a State's regulation of tobacco sales to minors. The Report of the United States Senate which accompanied the enactment of the FCLAA makes that point clear: "[Section 1334] would in no way affect the power of any State . . . with respect to . . . the sale of cigarettes to minors." S.Rep. No. 91-566, 91st Cong., 1st Sess. 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. Moreover, such an interpretation is consistent with the purposes of the 1969 Act. Ordinance 307 does not create "diverse, nonuniform, and confusing" standards and relies on only a single, uniform standard: illegality.

The instant case differs from the claims that the *Cipollone* Court did find pre-empted. The Court held that Cipollone's failure to warn and neutralization of federally mandated warnings claims were pre-empted to the extent that they required "a showing that [the tobacco manufacturer's] post-1969 advertising . . . should have included additional, or more clearly stated, warnings." *Cipollone*, — U.S. at —, 112 S.Ct. at 2621. Ordinance 307 does not require any additions or alterations in the federally-mandated warning labels. Therefore, Ordinance 307 is distinguishable from Cipollone's pre-empted failure to warn and neutralization of federally mandated warnings claims.

The Court also found the first of Cipollone's fraudulent misrepresentation claims to be pre-empted. This claim was based on a state-law prohibition against statements in advertising and promotional materials that tended to minimize the health hazards associated with smoking. The Court held that the state prohibition was pre-empted because it was based on smoking and health and regarded advertising. Thus, Cipollone's claim based on this state prohibition could not stand. The Ordinance challenged in the present action, Ordinance 307, was promulgated to effectuate § 404. Unlike the state-law prohibition in *Cipollone*, the validity of § 404 is not challenged by Penn. Thus, Cipollone's claim is not analogous to the instant case.

Penn's second argument in support of its assertion that Ordinance 307 is "based on smoking and health" is that, regardless

of whether § 404 was "based on smoking and health," the true impetus behind the promulgation of Ordinance 307 was smoking and health concerns.

> Contrary to Defendant's contentions, concerns about smoking and health were, in fact, in the forefront of the City's concerns when it enacted Ordinance 307. Notwithstanding the City's efforts to obfuscate and camouflage those concerns, they none-the-less leaked out into the transcript of the City Council hearing on Ordinance 307. . . . Although apparently advised by their lawyers that if they abstained from saying the "H" word (health) they could successfully . . . not implicate the FCLAA pre-emption doctrine, the Chairman of the Hearing and the chief administrator of the city agency directly charged with protecting public health nevertheless let slip what everyone in the hearing room knew; that this cigarette advertising ban was based on concerns about smoking and health.

Plaintiff's Opp. to Def. Motion for Summ. Judg. at 11-12.

The "slips" Penn refers to occurred during the combined public hearings held on November 17, 1993 for Ordinances 307 and 262 before the City Council. The first "slip" Penn refers to was Chairman Anthony Ambridge's two statements that "These [Ordinances 307 and 262] will call into question several legal, health and aesthetic issues," Def.App. Ex. 6 p. 9, and "Federal and State governments have already determined that placing age restrictions on consumption of alcohol and tobacco products is in the public's health interest." Def.App. Ex. 6 p. 12. The second reference is to a letter from Dr. Peter Beilenson, the Commissioner of Health, that was received into the record by the City Council. In this letter, Dr. Beilenson wrote, "Not only is smoking a health hazard to the smoker . . . As we know, smoking is a health hazard to all in the immediate vicinity." Def.App. Ex. 6 p. 239.

Penn's suggestion that these comments change the purpose of Ordinance 307 is misguided. The City Council hearing process is an open one. Dozens of scientific experts, industry representatives, merchants, legal advisers and interested community members spoke their mind. The mention of "the 'H' word" at such a hearing could not change the purpose of the legislation in question from

that clearly stated in the law the legislature finally chose to adopt. As the Supreme Court observed in *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992),

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. Id. at 1149 (internal quotations and citations omitted). The City clearly stated what its purpose was in promulgating Ordinance 307: to effectuate § 404. Therefore, this Court need look no further than the language of Ordinance 307. In *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, — U.S. —, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993), the Supreme Court stated "we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate." *Id.* at —, 113 S.Ct. at 700. Likewise, in light of the clarity of the language the legislature chose to use in addressing the purpose of Ordinance 307 in its Preamble, this Court gives no weight to the statements of Chairman Ambridge and Dr. Beilenson.

The statements of Chairman Ambridge are irrelevant for yet another reason. The statements of Chairman Ambridge merely reflect his view as to the purpose of § 404, the prohibition against the sale of cigarettes to minors. But the purpose of § 404 is irrelevant to the present inquiry for the reasons discussed earlier. Therefore, Chairman Ambridge's remarks are irrelevant as well. And it certainly is no surprise that Dr. Beilenson, the Commissioner of Health, noted the potential health impact of a bill under consideration at a public forum for the discussion of the passage of that bill. In fact, it is expected that he address possible health impacts of ordinances under consideration. Thus, Dr. Beilenson's letter also does not change the purpose of the legislature in passing the statute.

Penn also attempts to impute a health motive to Ordinance 307 by directing this Court to the tenth paragraph of the seventh whereas clause of the Preamble to Ordinance 307: "Cigarettes are

a 'gateway' drug among Maryland students, *i.e.*, a substance often used by adolescents as a first drug which appears to 'open the door' for use of harder drugs at a later date." Penn asserts that the City's stated concern regarding cigarettes as a "gateway" drug can be nothing but a health concern and that, therefore, Ordinance 307 is "based on smoking and health." This argument is also not persuasive. Penn interprets this subsection of the Preamble as if it stands alone, separate from the remainder of Ordinance 307. This is an improper method of statutory construction. "[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole." Sutherland Stat Const § 46.05 (5th Ed). As established earlier, Ordinance 307 clearly states that its focus is illegality. In light of this, it is apparent that this subsection also refers to illegality: the illegal use of "harder drugs."

Penn relies heavily on *Vango Media, Inc.* v. *City of New York*, 829 F.Supp. 572 (S.D.N.Y.1993). This case concerned Vango's challenge of a New York City ordinance which required the display of one public health message pertaining to the health dangers of smoking for every four tobacco advertisements on certain property and facilities owned, operated or licensed by the City of New York, including taxicabs. But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus bringing the statute into conflict with the second stated purpose of the FCLAA. As the district court noted in holding that the statute was pre-empted by the FCLAA, "Congress had in mind avoiding precisely the type of anti-smoking message requirement now before this Court. The Local Law creates a regulation directly related to advertising that is 'diverse, nonuniform, and confusing' vis a vis the federal legislation." *Id.* at 583 (quoting 15 U.S.C. § 1331 (1970)). Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

This Court finds that Ordinance 307 is not "based on smoking and health." Rather, Ordinance 307 is clearly focused on illegality. Therefore, this Court holds that Ordinance 307 is not a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or

promotion of . . . cigarettes," and is not pre-empted by the FCLAA. Accordingly, this Court will grant the City's motion for summary judgment.

C. Ordinance 307 is not pre-empted by Maryland State Law

Penn next claims that Ordinance 307 is pre-empted by state law. Analogous to Federal law, "state law may pre-empt local law in one of three ways: (1) pre-emption by conflict, (2) express pre-emption, or (3) implied pre-emption." *Allied Vending* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). Penn argues that Ordinance 307 is invalid in that State law precludes it by the doctrine of implied pre-emption. The Court in *Allied Vending* elaborated upon this form of pre-emption, noting that:

> In *Sitnick*, we explained the theory of implied pre-emption: '[W]e wish it understood that there may be times when the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled.'

Id. at 298, 631 A.2d 77 (quoting *Mayor of Baltimore* v. *Sitnick*, 254 Md. 303, 323, 255 A.2d 376, 385 (1969)). Penn asserts that the State of Maryland has so forcibly expressed its intent to occupy the field of cigarette sales regulation as to pre-empt any local legislation in this area. Penn next argues that because the purpose of Ordinance 307 is to effectuate § 404, a prohibition of the sale of cigarettes to minors, Ordinance 307 is pre-empted by State law. Even if this Court accepts the proposition that Ordinance 307 would be pre-empted if Maryland State law completely occupied the field of cigarette sales regulation, a precarious position at best,[6] this

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[6] This position is questionable because Ordinance 307 regulates advertising, not sales. Though its purpose is to forward § 404, a law regulating sales, it is unclear to this Court whether this purpose would place a zoning ordinance regulating the placement of billboards, an area traditionally within the City's power, within the scope of the field Penn asserts is pre-empted, the field of cigarette sales regulation. This Court need not reach a conclusion regarding this issue because it is unnecessary to its holding. Therefore, this Court will not travel farther down this road.

argument could not succeed because the State has not completely occupied that field. Penn relies principally on *Allied Vending* in attempting to establish this proposition.

Penn asserts that the Maryland Court of Appeals in *Allied Vending* held that the State of Maryland has completely occupied the field of cigarette sales regulation, thus pre-empting any local legislation in this area by implication. Penn has misread *Allied Vending*. The Court in *Allied Vending* emphatically held that "in light of the comprehensive state-licensing scheme for cigarette vending machines provided by Article 56, §§ 607 through 631," *Allied Vending*, 332 Md. at 300, 631 A.2d 77, the State has expressed its intent to completely occupy the field of the sale of cigarettes through vending machines. In conclusion, the Court stated:

> In short, through the enactment of Article 56, §§ 607 through 631, the General Assembly has manifested an intent for the State to completely occupy the field of the sale of cigarettes through vending machines rendering any local or municipal ordinances in this area constitutionally invalid.

Id. at 310, 631 A.2d 77. Thus, the pre-emptive scope of Maryland State law, as established in *Allied Vending*, is substantially less broad than Penn asserts.

Ordinance 307 does not fall within the pre-emptive scope of §§ 607-631. The purpose of Ordinance 307 is to effectuate § 404, the State law prohibition of the sale of cigarettes to minors. Though the reach of the field pre-empted—regulation of the sale of cigarettes through vending machines—overlaps the reach of § 404—the sale of cigarettes to minors—the two are distinct and separate fields. Penn does not claim that § 404 demonstrates the intent of the State to completely occupy the field of the regulation of cigarette sales to minors, nor, in this Court's view, would it have been successful had it chosen to do so. Therefore, this Court holds that Ordinance 307 has not been pre-empted by State law. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

III. CONCLUSION

For the foregoing reasons, the City's motion for summary judgment will be granted as to all claims. The Court will enter a separate Order consistent with this Memorandum.

Senior United States District Judge

Dated: August 11, 1994

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANHEUSER-BUSCH, INCORPORATED,

Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Defendants-Appellees,

and

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

Nos. 94-1431, 94-1432.

Argued March 6, 1995.
Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, Circuit Judge:

We decide in this case whether Ordinance 288 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises alcoholic beverages" in certain areas of the City, violates the First

and Fourteenth Amendment protections of commercial speech. The district court concluded, after applying the four-part test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), that the ordinance did not violate the Constitution,[1] and we now affirm.

I

Under Maryland law, it is illegal to sell any alcoholic beverage to, or to obtain any alcoholic beverage for, a person under 21 years of age. It is also illegal for a person under 21 years of age to obtain, possess, or control an alcoholic beverage. Md.Code, Art. 27, §§ 400-403A. To advance the state's interest in those prohibitions and to promote "the welfare and temperance of minors exposed to advertisements for alcoholic beverages," the Maryland legislature authorized the Mayor and City Council of Baltimore (collectively "Baltimore") to adopt an ordinance restricting the placement of signs that advertise alcoholic beverages in "publicly visible locations," *i.e.* on "outdoor billboards, sides of buildings, and freestanding signboards." Md.Code, Art. 2B, § 222. The authorization, however, contains 10 limitations which prohibit Baltimore from restricting such advertising on, for example, buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums.

In January 1994, Baltimore exercised the authority granted it by the State and enacted Ordinance 288 prohibiting the outdoor advertising of alcoholic beverages in certain locations in Baltimore City.[2] The prohibition in the ordinance is subject to the same 10

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[1] The district court also concluded that the protection afforded by Article 40 of the Maryland Declaration of Rights is no broader than that afforded by the First Amendment and that therefore the ordinance also did not violate the Maryland Constitution. That ruling is not appealed.

[2] The core provision of the ordinance provides:

exceptions specified in the State's authorizing statute, and it also includes an exception permitting such advertising in certain commercially and industrially zoned areas of the City. By its terms, the ordinance was to become effective February 5, 1994.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages.[3] While one of the studies, the report of the Governor's Prevention Committee, acknowledged that certain studies advanced by the alcohol beverage and advertising industries showed no correlation between alcohol advertising and underage drinking, it concluded that the overwhelming majority of research studies showed a definite correlation. To combat underage drinking, the Prevention Committee's report recommended, among other things, that communities regulate alcoholic beverage advertising on billboards.

> Alcoholic beverage advertisements. No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings, and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(H).

[3] The preamble to the ordinance refers to at least four studies considered by the City Council: (1) a report by the Prevention Committee of the Governor's Drug and Alcohol Abuse Commission, entitled "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking"; (2) the "1992 Maryland Adolescent Drug Survey" conducted by the Maryland State Department of Education; (3) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Dangerous and Deadly Consequences"; and (4) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Drinking and Crime."

In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the "'overwhelming majority' of research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

On January 14, 1994, several weeks before the ordinance was to become effective, Anheuser-Busch, Inc., filed suit in federal court, facially challenging the constitutionality of the ordinance under the First and Fourteenth Amendments. It also challenged the ordinance as it might be applied to public service messages which Anheuser-Busch typically sponsors. One week later, Penn Advertising of Baltimore, Inc., filed a similar suit.

Anheuser-Busch is the nation's largest brewer of beers and malt beverages, producing approximately 15 different brands,

including Budweiser, Michelob, and Busch. It advertises in all media, including outdoor billboards and displays. In addition to contending that there is no correlation between alcoholic beverage advertising and underage drinking, Anheuser-Busch asserts that the purpose of its advertising is "to solidify brand loyalty and increase market share by shifting adult beer drinkers from other brands to the advertised brand of beer." In its complaint, Anheuser-Busch alleges that it promotes its brands of beer on dozens of billboards in Baltimore and that on seven it publishes public service messages such as, "Know when to say when" and "Let's stop underage drinking before it starts." These public service messages typically include a corporate or product logo of Anheuser-Busch.

Penn Advertising is engaged in the business of placing advertising on outdoor advertising signs located throughout Baltimore. It leases land from private property owners, erects and maintains outdoor sign structures on those locations, and rents these signs to its customers, including Anheuser-Busch.

Shortly after commencing these actions, Anheuser-Busch and Penn Advertising filed a motion for a preliminary injunction to enjoin enforcement of Ordinance 288 pending the litigation, and the district court issued a stay of the ordinance's enforcement. The Mayor and City Council of Baltimore filed motions to dismiss the actions under Federal Rule of Civil Procedure 12(b)(6) on the grounds that the ordinance is (1) protected by the Twenty-First Amendment and (2) a proper regulation of commercial speech under the framework established in *Central Hudson*. Baltimore attached to its motions the legislative history of Ordinance 288, including the transcript of the hearings before the City Council and copies of four studies that were considered by the Council.

Following a hearing, the district court issued an opinion upholding the constitutionality of the ordinance. *Anheuser-Busch, Inc.* v. *Mayor and City Council*, 855 F.Supp. 811 (D.Md.1994). The court also continued its stay of the ordinance's enforcement pending appeal. Contrary to the parties' entreaties that the district court treat Baltimore's motion only as a 12(b)(6) motion, the court concluded in its opinion that because it considered matters outside of the pleadings, it would treat Baltimore's motion to dismiss as a

motion for summary judgment under Rule 56. On the merits, the court found that "a reasonable fit exists between the Ordinance and the City's asserted interests," *id.* at 820, and that billboards "loom[ ] over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement." *Id.* at 822. The court held the ordinance constitutional after concluding that it "directly advances the City's asserted interest in promoting the welfare and temperance of minors" and is "narrowly tailored" to that end. *Id.* at 818. Having found the ordinance constitutional under the framework set outk in *Central Hudson*, the court did not address Baltimore's argument that the ordinance was protected by the Twenty-First Amendment.

On appeal, Anheuser-Busch and Penn Advertising contend that the district court erred by converting Baltimore's motions to dismiss into motions for summary judgment without allowing them a reasonable opportunity to submit all materials pertinent to consideration of a motion for summary judgment. On the merits, they argue that the ordinance is unconstitutional on its face because (1) it does not directly and materially advance the government's interest in promoting temperance of minors and (2) it is not narrowly tailored to serve that purpose.[4] They also argue that, as applied, the ordinance would impermissibly restrict their noncommercial speech.

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[4] Amici curiae briefs, addressing principally the facial challenge under the First Amendment, were received from the Association of National Advertisers, Inc., the American Association of Advertising Agencies, The Media Institute, the National Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, and the Center for Science in the Public Interest.

II

We address first the contention that the district court erred in converting Baltimore's motions to dismiss into motions for summary judgment without first providing the parties an opportunity to conduct discovery and to submit all pertinent materials to the court. Anheuser-Busch and Penn Advertising contend that they had no indication that the district court had converted the motions to dismiss into motions for summary judgment until the court issued its memorandum opinion.

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

(Emphasis added). We have held that a court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56. *See Gay* v. *Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Plante* v. *Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson* v. *RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974).

In ruling on Baltimore's 12(b)(6) motions, the district court stated, without prior notice to the parties, "Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56." 855 F.Supp. at 812. Apparently the court's facial analysis of the ordinance relied to some extent on the exhibits which Baltimore filed with its motion to dismiss, and the court's as-applied analysis involved consideration of the submissions Anheuser-Busch offered in support of its motion for a preliminary injunction. The exhibits

which Baltimore filed in support of its motion to dismiss consisted of a copy of Ordinance 288, a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance. In support of their motions for a preliminary injunction, Anheuser-Busch and Penn Advertising submitted, among other things, the Brewing Industry Advertising Code, sample billboard advertisements, and studies which refute a correlation between alcoholic beverage advertising and underage drinking.

The principal challenge to Ordinance 288, advanced under the last two prongs of *Central Hudson*, consists of the contention that the ordinance (1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore's statutory objective and the means it selected to achieve that objective. On this facial challenge, the City bears the burden not of establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had an objectively reasonable belief that the means which it selected constituted a reasonable "fit" with the regulation's purpose.

If *Central Hudson's* test required a perfect fit, then Anheuser-Busch would only have to demonstrate some application of the statute inconsistent with the statute's purpose to render it unconstitutional for all purposes. Moreover, if the test required a perfect fit, Anheuser-Busch would certainly be entitled to complete discovery in order to identify all of the statute's possible applications. However, in response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. *See, e.g.*,

Florida Bar v. *Went For It, Inc.*, — U.S. —, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). As the Supreme Court recently observed in *Florida Bar*:

> [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at — - —, 115 S.Ct. at 2377-79 (citations omitted). Cf. *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (pointing to facts relevant to consideration of *as-applied* challenge to commercial speech regulation). In *Florida Bar*, the Court relied principally on a study conducted by the Florida bar on the effects of lawyer advertising to conclude that the prohibition against lawyer solicitation within 30 days of an accident directly and materially advanced the state's substantial interest of preserving the integrity of the legal profession. Thus, the government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are "legislative facts," the substance of which cannot be trumped by the fact finding apparatus of a single court. *See Dunagin* v. *City of Oxford*, Miss., 718 F.2d 738, 748-49 n. 8 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). While a party challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other. The court's role in reviewing the constitutionality of a legislative enactment is more fundamental; it is limited to addressing whether the legislative enactment conflicts with the Constitution. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

By force of the same reasoning, if a plaintiff challenges a legislative enactment *as applied* to an actual circumstance, then the

court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the legislative enactment. *See Edenfield*, — U.S. at —— - ——, 113 S.Ct. at 1800-01.

In this case, the district court properly looked to the legislative history of Ordinance 288 to determine that Baltimore had met its burden under *Central Hudson*. Having found the burden met, the court was not required on a facial challenge to look further with a more specific inquiry into the ordinance's impact on Anheuser-Busch and Penn Advertising, nor did it. It was unnecessary for the court to have concluded that, because it looked beyond the pleadings to the transcript and four studies constituting the legislative history, it had to consider the case under Rule 56. For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law. *See generally* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint).

Thus, on the facial challenge to Ordinance 288, we will review the district court's decision, insofar as it considered only the ordinance and its legislative history, as a ruling under Federal Rule of Civil Procedure 12(b)(6), and we review that ruling *de novo*.

III

Traditionally, commercial speech was thought to be an aspect of a free market economy, providing information necessary to enable informed market decisions to be made. While commercial speech was subject to governmental regulation, such regulation was resisted by the same forces that favor open and competitive markets. Such speech was not, however, thought to be protected by the First Amendment. *See, e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). Beginning in 1975 with the Supreme Court's decision in *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), and in 1976

with its decision in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), a "measure" of First Amendment protection was afforded commercial speech in respect of its informational function. But that protection is significantly weaker than that accorded to the regulation of which is examined under the rubric of strict scrutiny. *See Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505-07, 101 S.Ct. 2882, 2891-92, 69 L.Ed.2d 800 (1981) (plurality opinion). The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny, *see generally Florida Bar*, — U.S. at ——-——, 115 S.Ct. at 2375, which is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

Intermediate scrutiny of commercial speech regulation is conducted under the four-pronged scheme set forth in *Central Hudson*. Because the basis for affording protection to commercial speech pertains to its informational function, in order to be entitled to any First Amendment protection, the speech must (1) concern lawful activity and not be misleading. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," *i.e.* "not more extensive than is necessary" to serve the governmental interest. *Id.* at 565-66, 100 S.Ct. at 2351. *See also Florida Bar*, — U.S. at ——, 115 S.Ct. at 2375-77.

The first two prongs of *Central Hudson* are not disputed in this case. First, the purchase and consumption of alcoholic beverages are generally lawful, and no party claims that Baltimore's ordinance targets misleading advertising. And second, it is conceded that Baltimore City has a substantial interest in promoting "the welfare and temperance of [its] minors," the interest which it seeks to advance through Ordinance 288. The dispute in this case centers on the third and fourth prongs of *Central Hudson*—whether

Ordinance 288 "directly advances" Baltimore City's interest in reducing underage drinking and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry required under these two prongs amounts to consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986); *United States* v. *Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993).

The inquiry under *Central Hudson's* third prong—whether the regulation directly advances the stated interest—does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation. In *Edge*, where the federal regulation under consideration prohibited the broadcasting of lottery advertisements from facilities in North Carolina (in support of that state's anti-gambling policy), the Edge Broadcasting Company contended that the regulation did not advance the governmental interest at stake by sufficiently direct means. The company demonstrated that even though its broadcasting facility was located on the North Carolina side of the Virginia/North Carolina border, over 90% of its listeners were located in Virginia, where gambling was not illegal. It also noted that the federal regulation did not prohibit a Virginia-based broadcasting company from directing its signal to North Carolina listeners and advertising the Virginia lottery. The company argued, therefore, that the regulation did not directly advance the stated governmental interest of supporting North Carolina's anti-gambling policy. Rejecting the company's argument, the Supreme Court applied a standard that validated the legislature's commonsense judgment that its interests would be advanced by the regulation:

> Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from

> lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.

--- U.S. at ---, 113 S.Ct. at 2704. As the result of applying this standard the Court concluded, "We have no doubt that the statutes directly advanced the governmental interest at stake in this case. . . . [T]his would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* --- U.S. at ---, 113 S.Ct. at 2704.

Similarly, in *Posadas* the Court observed that it was reasonable for the Puerto Rico legislature to conclude that its interest in reducing its residents' demand for casino gambling would be advanced by placing limitations on casino advertising. *See* 478 U.S. at 341-42, 106 S.Ct. at 2977.

Again in *Metromedia*, the Court summarized this approach to the third prong of *Central Hudson* by noting that the reviewing court may be satisfied where the legislative judgment is "not unreasonable." 453 U.S. at 509, 101 S.Ct. at 2893. The Court applied that principle in upholding a ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, even in the face of a claim that the record was "inadequate to show any connection between billboards and traffic safety." *Id.* at 508, 101 S.Ct. at 2893.

In each case where the Supreme Court affirmed the legislative judgment as reasonable, a logical correlation existed between the legislative objective and the means selected to achieve that objective. Thus in *Edge*, even though only 7.8% of Edge Broadcasting's listening public lived in North Carolina and even though that small population would still be subject to Virginia-based lottery advertisements, the Court concluded that North Carolina's anti-gambling policy would be advanced by prohibiting all lottery advertising by North Carolina-based facilities. *See* --- U.S. at ---, 113 S.Ct. at 2704. In *Posadas*, Puerto Rico's regulation prohibiting casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico" was likewise found to advance Puerto Rico's interest in reducing its residents' demand for casino gambling. *Id.* at 341, 106 S.Ct. at 2976-77. Adding to the

obviousness of that logic, the Supreme Court noted that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view." *Id.* at 342, 106 S.Ct. at 2977 (citing the statement from *Central Hudson*, "There is an immediate connection between advertising and demand for electricity [the advertised product]. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569, 100 S.Ct. at 2353).

In line with these precedents, we find that it was reasonable for the Baltimore City Council to have concluded that Ordinance 288's regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. The City Council found that outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in their neighborhood, are exposed daily to this advertising. The City Council pointed to its legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies have reached the same conclusion. There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson's* third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

Each circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing demand. In Dunagin, the Fifth Circuit stated:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated, common-sense judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

718 F.2d at 750. Similarly, in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Tenth Circuit upheld a prohibition against advertising alcoholic beverages, stating:

> [W]e hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales.

Id. at 501, 101 S.Ct. at 2889. We now join these courts in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking.[5]

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[5] The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*, may, however, be insufficient to support a general prohibition against price advertising of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir.1994), *cert. granted*, — U.S. —, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995). *Cf. Rubin* v. *Coors Brewing Co.*, — U.S. —, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars").

Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. 447 U.S. at 556, 100 S.Ct. at 2343. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. *See Florida Bar*, — U.S. at —, 115 S.Ct. at 2375-77; *Board of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 478, 109 S.Ct. 3028, 3033-34, 106 L.Ed.2d 388 (1989). In assessing whether a regulation is narrowly tailored to serve the state's interest under an intermediate scrutiny framework, the Supreme Court has held that the fit between the regulation and the state's interest need not be perfect, but need only be reasonable. *See Fox*, 492 U.S. at 480, 109 S.Ct. at 3034-35. Summarizing the fourth prong of *Central Hudson*, the Court in *Fox* stated:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

490 U.S. at 469, 109 S.Ct. at 1913 (citations and internal quotations omitted). Thus, if a regulation goes only "marginally beyond what would adequately have served the governmental interest," the regulation will not be invalidated; only when a regulation is "substantially excessive, disregarding far less restrictive and more precise means" will the regulation be invalidated under this prong of *Central Hudson*. *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034 (citations and internal quotations omitted). And when there is no "far less restrictive and more precise means" available, the Court has accepted a broad ban of commercial advertising on the grounds that it was "perhaps the only effective approach." *Metromedia*, 453 U.S. at 508, 101 S.Ct. at 2893.

Satisfaction of the fourth prong of the *Central Hudson* test presents the closest question in this case. It is readily acknowledged that limitations on outdoor advertising of alcoholic beverages designed to protect minors also reduce the opportunities for adults to receive advertised information. And adults, who constitute a majority of the population, are not the object of the government's legislation. But it also appears that no less restrictive means may be available to advance the government's interest.

Anheuser-Busch argues that Baltimore could just as effectively advance its goal of promoting the welfare and temperance of minors by increasing enforcement of existing laws prohibiting sales to, and possession of alcoholic beverages by, minors, or by implementing and encouraging educational programs on the dangers of alcohol. These approaches might indeed prove beneficial in reducing underage drinking, but they do not provide an alternative to the approach selected by the City of curbing the enticement to consume alcoholic beverages. As the Supreme Court observed, quoting the Fifth Circuit in *Dunagin*:

> "We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol . . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers."

Posadas, 478 U.S. at 344, 106 S.Ct. at 2978 (quoting *Dunagin* v. *City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984)).

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to

address, the City must be given some reasonable latitude. *See Posadas*, 478 U.S. at 346-47, 106 S.Ct. at 2979-80; *Metromedia*, 453 U.S. at 509, 101 S.Ct. at 2893; *Ohralik*, 436 U.S. at 455-56, 98 S.Ct. at 1918. Similar problems did not defeat the legislature's efforts in Posadas (where a ban that went substantially beyond the targeted population was upheld); in Edge (where a ban that was intended to apply to only 7.8% of the regulated company's listening public was upheld); or in Metromedia (where a ban on all billboards containing commercial advertising was upheld, even though some signs might not create a traffic hazard).

The problem of underage drinking is a most serious one that contributes significantly to a variety of social problems. Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related, and 40 to 50% of juveniles who drowned or had diving accidents had consumed alcohol immediately prior to the incident. The City Council found that alcohol is overwhelmingly and consistently the most widely used "drug" at all adolescent age levels. It pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30 days. Widespread underage drinking was also found to be a major factor in crime. One-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours, and nearly 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

While it was readily recognized that regulating outdoor advertising would not wholly cure these problems, the regulation was one of the means recommended by the Governor's Prevention Commission, and it was responsive to numerous studies which link alcohol advertising and underage drinking. Through outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message. *See Packer Corp.* v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274, 76 L.Ed. 643 (1932) (billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). The City argues that the only means to address this problem is to ban such advertising in locations where children generally walk and play. Such a ban still permits adults

to receive advertising messages and information from signs in commercial areas of the City and through the numerous other media to which adults are constantly exposed.[6]

Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration. Accordingly, we find that Baltimore's Ordinance 288 limiting the location of outdoor billboards advertising alcoholic beverages in the City of Baltimore meets *Central Hudson's* fourth prong.

In summary, Baltimore City's regulation of stationary outdoor "advertising that advertises alcoholic beverages" in certain locations directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are involuntarily and unavoidably exposed to such advertisements. While the means selected of limiting the location of such outdoor advertising is not a perfect "fit" with the governmental objective, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

IV

In addition to their facial challenge of Ordinance 288, Anheuser-Busch and Penn Advertising contend that "as applied" the ordinance will impermissibly restrict *noncommercial* speech. They

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[6] It is noteworthy that for similar reasons the FCC has prohibited cigarette advertising on television and other electronic media. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 *et seq.* (upheld in *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.D.C.1971), *summarily aff'd. sub nom. National Assoc. of Broadcasters* v. *Kleindienst*, 405 U.S. 1000, 92 S.Ct. 1290, 31 L.Ed.2d 472 (1972)). Yet parents have more control over children's exposure to television than they have over children's exposure to outdoor advertising.

argue that the prohibition of outdoor "advertising that advertises alcoholic beverages" would prohibit their noncommercial public service messages which, they maintain, address issues of public interest. On "at least seven" of its billboards in Baltimore City, Anheuser-Busch has devoted a portion of its advertising display space to public service messages, such as "Let's stop underage drinking before it starts," and "Take a friend home for the holidays—friends know when to say when." These messages also include the corporate logo for Anheuser-Busch or a reference to "Budweiser."

There are no allegations that Baltimore considers these signs to fall under the ordinance as "advertising that advertises alcoholic beverages." Indeed, Anheuser-Busch's complaint was filed before the ordinance was to take effect, and as a result, the enforcement of the ordinance has been stayed. Furthermore, the City has indicated that it does not intend to enforce the ordinance against noncommercial speech.

In addressing this argument, the district court observed that whether the public service messages actually constitute noncommercial speech is arguable. The court assumed, without deciding, that the ordinance would not apply to legitimate public service messages, but was unwilling to "render an advisory opinion solely to distinguish between legitimate [public service messages] and true advertisements." 855 F.Supp. at 821. The question of whether speech both advertising a product and providing a public service message constitutes commercial speech is not well settled and may rest strictly on factual findings.

It is settled that commercial speech is speech which does "no more than propose a commercial transaction." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983) (citations and internal quotations omitted). But in *Bolger* the Court held that multi-page flyers published by a contraceptive manufacturing company to publicize the availability and desirability of contraceptives constituted commercial speech "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68, 103 S.Ct. at 2881 (footnote omitted). The

Court explained, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68, 103 S.Ct. at 2881 (quoting *Central Hudson*, 447 U.S. at 563 n.5, 100 S.Ct. at 2350 n.5).

In this case, Ordinance 288 is directed only at commercial billboards advertising the sale of alcoholic beverages and does not facially regulate public service messages. The question of whether a particular billboard falls within the ordinance's proscription is, on the record before us, a hypothetical one. The City has not threatened to enforce its ordinance against such public service messages and has indicated that it does not intend to do so. Accordingly, we conclude that such an as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular advertisement.

For the reasons stated, we affirm the judgment of the district court, upholding Baltimore City Ordinance 288 against a facial constitutional challenge under the First and Fourteenth Amendments.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE,

Amici Curiae.

No. 94-2141

On Petition for Rehearing with Suggestion for Rehearing In Banc

Filed October 16, 1995.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX E

Baltimore Ordinance No. 307 (City Council Bill 627):

AN ORDINANCE concerning

ZONING CODE—ADVERTISING CIGARETTES

FOR the purpose of restricting the placement of outdoor advertisements for cigarettes; and providing a penalty.

BY adding
Article 30 - Zoning
Chapter 10 - Sign Regulations
Section 10.0-1i
Baltimore City Code (1983 Replacement Volume, as amended)

By repealing and reordaining with amendments
Article 30 - Zoning
Chapter 11 - Administration and Enforcement
Section 11.07
Baltimore City Code (1983 Replacement Volume, as amended)

Preamble

WHEREAS, Section 404 of Article 27 of the Maryland Code makes it unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years; and

WHEREAS, More than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, Cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes; and

WHEREAS, Outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in Packer Corporation v. Utah, 285 U.S. 105 (1932) by citing with approval the following excerpt from the opinion of the Utah Supreme Court:

> "Advertisements of this sort are constantly before the eyes of observes on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

WHEREAS, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."); gambling, see Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341-42 (1986) ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one

. . . "; cigarettes, see Capital Broadcasting Co. v. Mitchell, 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people."), aff'd per curiam, 405 U.S. 1000 (1972); and alcohol, see Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (1983) (extensively reviewing evidence on connection between liquor advertising and consumption and rejecting inter-brand competition argument), cert. den., 104 S. Ct. 3533 (1984); and

WHEREAS, In addition to judicial recognition of the general link between advertising and consumption, there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including:

> Davis R. "Current trends in cigarette advertising and marketing". New England Journal of Medicine. 1987;316:725-732
>
> Chapman S., Fitzgerald B. "Brand preference and advertising recall in adolescent smokers: some implications for health promotion". American Journal of Public Health. 1982;72:491-494
>
> Klintzner M., Gruenewald PJ, Bamberger E. "Cigarette advertising and adolescent experimentation with smoking." British Journal of Addiction. 1991;86:287-298
>
> Goldstein AO, Fischer PM, Richards JW, Cretin BA. "Relationship between high school student smoking and recognition of cigarette advertisements." Journal of Pediatrics. 1987;110:488-491
>
> Hunter SM, Webber LS, Berenson GS. "Cigarette smoking and tobacco usage behavior

in children and adolescents: Bogalusa Heart Study." Preventive Medicine. 1980;9:701-712

Hunter Sm, Croft JB, Burke GL, Parker FC, Webber LS, Berenson GS. "Longitudinal patterns of cigarette smoking and smokeless tobacco use in youth: the Bogalusa Heart Study." American Journal of Public Health. 1986;76:193-195

Aitken PP, Leathar DS, O'Hagan FJ, Squair SI. "Children's awareness of cigarette advertising and brand imagery." British Journal of Addiction. 1987;82:615-622

Charlton A. "Children's advertisement awareness related to their views of smoking". Health Education Journal. 1986;45(2)75-78

Aitken PP, Leathar DS, Squair SI. "Children's awareness of cigarette brand sponsorship of sports and games in the UK". Health Education Research. 1987;1:203-211

Alexander HM, Calcott R., Dobson AJ, et al. "Cigarette smoking and drug use in school children, IV: factors associated with changes in smoking behavior". International Journal of Epidemiology. 1983;12:59-66

WHEREAS, The 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education found that:

Cigarettes are the second most commonly used substance by Maryland adolescents, with 41.9% of twelfth graders and 11.2% of sixth graders having used cigarettes in the twelve months preceding the study.

Cigarettes constitute a "gateway drug" among Maryland students, i.e., a substance which is used by adolescents as

a first drug and opens the door for use of other "harder" substances at a later date.

75% of twelfth graders first tried cigarettes before the age of 15.

By age 10 or under, 12.4% of males and 9.3% of females smoke.

Roughly 14% of twelfth graders smoke on a daily basis.

The percentage of Maryland students using cigarettes in the twelve months preceding the survey exceeds the national percentage by 13.6% for twelfth graders, 15% for tenth graders, and 12.1% for eighth graders.

Cigarette users were more likely than users of other substances described in the Survey to report having tried unsuccessfully to stop.

Cigarette use by sixth graders appears to be increasing with the percentage of sixth graders reporting having used cigarettes in the past thirty days increasing from 3.6% in 1988 to 4.7% in 1992.

4.7% of sixth graders, 14.4% of eighth graders, 22.7% of tenth graders, and 31.5% of twelfth graders reported use of cigarettes within the past 30 days.

Cigarettes are a "gateway" drug among Maryland students, i.e., a substance often used by adolescents as a first drug which appears to "open the door" for use of harder drugs at a later date; and

WHEREAS, An ordinance restricting the placement of advertisements for cigarettes in publicly visible locations within Baltimore City is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors; and

WHEREAS, The restrictions contained in the following Ordinance will not unduly burden legitimate business activities of persons licensed by the State of Maryland to sell cigarettes on a retail basis; and

WHEREAS, In order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities, the Baltimore City Council has determined not to restrict advertisements of cigarettes in certain designated business and industrial zones hereinafter identified, with reasonable and appropriate setbacks from adjoining zones; now, therefore,

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983) Replacement Volume, as Amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations.

10.0-1. General Requirements.

I. CIGARETTE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR OTHER FORM OF ADVERTISING THAT ADVERTISES CIGARETTES IN A PUBLICLY VISIBLE LOCATION. IN THIS SECTION "PUBLICLY VISIBLE LOCATION" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE ANY PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS "LICENSE" AS DEFINED IN SECTION 16-201(B) OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE; OR (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING CIGARETTES;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING SUCH PREMISES;

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRE;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF CIGARETTES;

5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF CIGARETTES;

6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;

7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;

8. ANY SIGN AT MEMORIAL STADIUM;

9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;

10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR

11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM ANY SUCH OTHER ADJOINING ZONE.

Chapter 11—Administration and Enforcement

11.07. Penalties for Violation.

Any person who violates, disobeys omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING THE PROVISIONS OF SECTION 10.0-1I MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

SEC. 3. AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

Certified as duly passed this 28th day of February, 1994.

(Signed) Mary Pat Clarke

President, Baltimore City Council

Certified as duly delivered to His Honor, the Mayor, this 1st day of March, 1994.

(Signed) Leonard F. Wright

Chief Clerk

Approved this 7th day of March, 1994.

(Signed) Kurt L. Schmoke

Mayor, Baltimore City

APPENDIX F

Baltimore Ordinance No. 328 (City Council Bill 709):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated area(s) on which all signs for the premises shall be located. The consolidated area(s) shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

Chapter 13 — Rules and Definitions

13.0-2. Definitions.

74. Sign: any writing (including letter, word, or numeral), pictorial representation (including illustration or graphic), emblem (including symbol or trademark), flag (including banner or pennant), device, or any other figure of similar character which: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a building, window (this includes anything affixed to the interior and displayed in the space within twelve inches of the window), or other structure; and (b) is used to announce, direct attention, or advertise; and (c) is visible from outside a building. A sign shall not, however, include any writing, representation, or any figure of similar character within a building.

* * * *

APPENDIX G

Baltimore Ordinance No. 329 (City Council Bill 711):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated areas on which all signs for the premises shall be located. The consolidated areas shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

8. Any sign on the side of a "licensed premises", as defined in Article 2B of the Annotated Code of Maryland, indicating the brand name and price of an alcoholic beverage product or a cigarette product available for sale within the "licensed premises" when permitted by any provision of this code or any other law or regulation now or hereinafter in force.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.